Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HARRIET COHEN

Petitioner

v.

CITY OF DES PLAINES

Respondent

PETITION FOR WRIT OF CERTIORIARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reversing the District Court's finding that a Des Plaines, Illinois ordinance, granting churches an exemption from otherwise generally applicable zoning ordinances for day care centers, violated the Establishment clause?

2. Did the Court of Appeals err in reversing the District Court's finding that a Des Plaines, Illinois ordinance, granting churches an exemption from otherwise generally applicable zoning ordinances for day care centers, violated the Equal Protection Clause?

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Order of the United States District Court
(September 30, 1992)

(The District Court's ruling on damages after a bench trial appears as Appendix C herein)

742 F.Supp. 459 (N.D. Ill. 1990):

(The District Court's ruling on Petitioner's motion for Summary Judgment appears as Appendix D herein).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Order of United States Court of Appeals for the Seventh Circuit
(Dec. 6, 1993)

(The order of the United States Court of Apeals for the Seventh Circuit denying Petitioners Petition For Rehearing En Banc appears as Appendix A herein.

8 F. 3d 484 (7th Cir. 1994):

(The opinion by the Seventh Circuit Court of Appeals affirming the District Court's opinion and judgment appears as Appendix B herein).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) on the grounds that the United States Court of Appeals for the Seventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

The final judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 25, 1993. The Seventh Circuit denied Petitioner's Petition for Rehearing En Banc on December 6, 1993. This petition for certiorari is filed within the extension period granted by Justice Stevens in this matter.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE LAW PROVISIONS

The Des Plaines Zoning Ordinance (Z-5-77) provides, in pertinent part, as follows:

3.1.2. USE REGULATIONS: A building or premises shall be used for the following purposes:

• • •

3.1.2.6 Churches, temples, religious reading rooms, rectories and parish houses, including nursery schools operated in any such building. (Amended January 17, 1977. Z-5-77.)

• • •

3.1.2.16 Day care Centers, but as a special use only. Such special use shall be permitted only upon a preponderance of evidence that the day care centers proposed will meet the following standards as well as the standards set forth in this ordinance for special uses in general.

3.1.2.16.7 The Zoning Board of Appeals shall consider the

density of existing day care facilites in the area. Such density shall be limited to two (2) day care centers per square mile, excluding those facilities existing in a church or temple.

• • •

3.1.2.16.15 The Plan Commission, Zoning Board and City Council may also take into consideration as a factor in reviewing the application the question of whether there is an economic need in the community for a day care center at the site proposed.

• • •

8.1.4 No SPECIAL USES shall be granted by the City Council unless the Special Use:

8.1.4.1 Is deemed necessary for the public convenience at that location.

8.1.4.2 Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

8.1.4.3 Will not cause substantial injury to the value of other property in the neighborhood in which it is located.

8.1.4.4 Meets that [sic] standards established in this ordinance for the particular Special Use requested.

STATEMENT OF THE CASE

Petitioner Harriet Cohen owns and operates day care centers in Des Plaines, Illinois and Arlington Heights, Illinois. In April of 1987, Petitioner sought to open another day care center in Des Plaines.

The building in which Petitioner desired to operate the day care center was formerly used as a church. The former church is located in a district zoned "R-2", a designation for an area used primarily for single family residences, but in which the city permits other special uses, among them, day care centers. Under the city's special use ordinance, day care centers must comply with various size, density, signage and safety requirements. However, the ordinance contains an exemption for certain religious facilities as follows:

> The Zoning Board of Appeals shall consider the density of existing day care facilities in the area. Such density shall be limited to two (2) day care centers per square mile, excluding those facilities existing in a church or temple.

Another section of the ordinance provides that certain uses or activities may be conducted without special permission from the City including, most saliently:

> Churches, temples, religious reading rooms, rectories and parish houses, including nursery schools operated in any of such buildings.

The Seventh Circuit, in the decision appealed from, accepted the District Court's determination that there is no functional difference between "day care centers" and "nursery schools" for purposes of Des Plaines' zoning ordinance. Cohen v. Des Plaines, 8 F.3d 484, 488 (7th Cir. 1993). Thus, the Des Plaines zoning regime allows an unlimited number of "day care centers" located in churches or other religious facilities to operate without a special use permit. All others seeking to open day care centers outside religious facilities must comply with the strictures of the zoning ordinance.

On April 13, 1987, Petitioner filed an application for a special 3

use permit to operate a day care center in Des Plaines on the property formerly used as a church. On September 21, 1987, the application was denied pursuant to certain criteria embodied in the zoning ordinance.

Petitioner filed suit against the City and its officials, alleging that the zoning ordinance violated, inter alia, the First Amendment's Establishment Clause, and the Fourteenth Amendment's Equal Protection Clause. The District Court entered summary judgment for Petitionér. Cohen v. City of Des Plaines, 742 F. Supp. 458 (N.D. Ill. 1990). It found that at least four day care centers operated in churches in areas zoned R-2. Cohen, supra, 742 F. Supp at 462-63. The court also found that at least one center operating in a "residential" zone was owned by a "for profit" corporation, and that all of the centers appeared to be "essentially commercial ventures even though located on church property", based on the fact that each of them charge fees and advertised in the yellow pages. Id. at 463, nn. 14 & 15. None of the centers, the Court determined, were required to obtain a special use permit in order to operate, by virtue of their being located on church property. Id at 463.

Based on these facts, the District Court held that the ordinance violated the Equal Protection Clause because the distinction set up by the ordinance - requiring special permits for day care centers in R-2 areas, while granting "carte blanche" to idential uses in religious buildings - was aribtrary and irrational. The court also ruled that the ordinance violated the Establishment Clause in that it effected a subsidy of the kind invalidated by this Court in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). The District Court then conducted a bench trial, after which it awarded Petitioner $824,793.15 in damages (opinion attached as Appendix C).

The Seventh Circuit reversed. Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993). The Appellate court accepted all of the District Court's findings of fact. Cohen, 8 F.3d at 488. It determined however, that the District court had erred as to the law. Regarding the Equal Protection Clause, the Court held that the ordinance rationally furthered the legitimate purpose of "alleviating significant governmental interference with the ability of religious organizations to determine and carry out their religious missions". 8 F. 3d at

494, quoting, Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 339 (1987). The Seventh Circuit also found the zoning ordinance rationally related to the "larger goals of residential zoning" by limiting day care centers to buildings already used to provide a service to the community, thereby preserving the essential character of the neighborhoods zoned residential. 8 F.3d at 495.

With regard to the Establishment Clause, the Seventh Circuit ruled that the ordinance satisfied the tripartite test of Lemon v. Kurtzman, 403 U.S. 602 (1971). The ordinance had the secular purpose of preventing governmental interference with the religious mission; its primary effect was not to advance religion (as long as the day care centers were "not for profit"); and it actually prevented rather than fostered excessive governmental entanglement. 8 F.3d at 495. The Seventh Circuit thus reversed the District Court's grant of summary judgment and remanded the case with instructions to enter judgment for the City.

I.

Argument for Granting the Writ

INTRODUCTION

This Court has observed that the role of the judiciary in enforcing the Establishment Clause is to:

> "...survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter"

Texas Monthly, Inc. v. Bullock, 489 U.S. 664, 696 (1970) (Harlan, J. concurring). This case presents the Court with legislation that effects a blatant "religious gerrymander". The "circumference" of the class encircled by the legislation is exceedingly narrow, so that

its primary beneficiary (or in some applications, its only beneficiary) is religion. Petitioner contends, as more fully explained below, that the Des Plaines zoning ordinance under consideration confers "...unjustifiable awards of assistance to religious organizations and cannot but 'conve[y] a message of endorsement' to slighted members of the community.'" Bullock, supra, 489 U.S. at 15, citing, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J. Concurring).

More specifically, it is Petitioner's contention that the exemption in the Des Plaines ordinance for religious institutions cannot reasonably be seen as removing a burden on the free exercise of religion. No evidence was introduced in this case to suggest that a neutrally applied zoning ordinance would constitute "significant governmental interference with the ability of religious organizations" to carry out their mission. Amos, supra, 483 U.S. at 335. Nor is there anything in the nature of size, signage or safety requirements which would obviously burden the mission of any religious institution. The Seventh Circuit's ipse dixit assertion that the exemption for religious institutions in the Des Plaines' ordinance "minimizes governmental interference with the decision making processes of []religious organization[s]...", 8 F.3d at 490, is palpably unconvincing. And because the scope of the exemption is so narrow, limiting its benefits primarily to religious organizations, the ordinance constitutes a subsidy to religion of the kind invalidated in Bullock, supra. (The ordinance "lacks sufficient breadth to pass scrutiny under the Establishment Clause". Bullock, 489 U.S. at 14).

It is Petitioner's further contention that the distinction drawn by Des Plaines' zoning ordinance between religious organizations and all others who seek to operate day care centers is violative of the Equal Protection Clause in that it is without a rational basis. Indeed, the exemption permitting the unlimited proliferation of religiously operated day care centers in residential districts would seem to undermine the very purposes animating zoning ordinances in the first place (i.e., protection from crowding, traffic congestion, noise, etc.). Agins v. City of Tiburon, 447 U.S. 255, 261 (1980). Petitioner submits that the seventh Circuit's determination that the ordinance

was rational in that it "alleviated significant governmental interference with the ability of religious organizations to define and carry out their religious missions", 8 F.3d at 494, was error because there was no evidence that a neutrally applied zoning ordinance would have any effect whatsoever on religion. Similarly, the Seventh Circuit's holding that "the ordinance is rationally related to the larger goals of residential zoning" is thoroughly undermined by the fact that the exemption exacerbates, rather then controls, "crowding, traffic congestion and noise" by permitting unlimited numbers of religiously operated day care centers.

Lastly, there is the Seventh Circuit's troublesome alchemization of the facts of this case and the statutory language involved. The District Court observed that it was likely that the existing day care centers in Des Plaines's residential districts were really commercial ventures operated on church premises. Cohen, supra, 742 F. Supp at 463, nn. 14 & 15. The evidence showed that these day care centers advertised in the yellow pages and charged a fee for their services, and that at least one of the centers was operated by a "for profit" corporation. Id at 463. The Seventh Circuit accepted the District Court's findings. Cohen, 8 F.3d at 488. Yet the court ignored the import of these findings, and read into the ordinance the requirement that the day care centers operated from church premises be "not for profit". 8 F. 3d at 493. The ordinance would have to be construed this way, said the Court, to avoid the problem "noted by Justice Brennan in Bullock, of government 'providing unjustifiable rewards of assistance to religious organizations.'" 8 F.3d at 473, quoting Bullock, supra, 489 U.S. at 15. In other words, the Seventh Circuit first ignored the factual findings it earlier had credited, and then rewrote the statute to include a new requirement not found in or implied by the statute as originally written. It should not have done the former and was without authority to do the latter.

At the very least, the case should have been remanded to the District Court to enable Petitioner to demonstrate that the law violated the Equal Protection Clause because the existing day care centers operating out of churches were in fact "for profit" as opposed "not for profit". Instead, the Seventh Circuit remanded

the case with directions to enter judgment for the city. This aspect of the Court's decision is unexplained and unexplainable.

In light of the foregoing, Petitioner respectfully urges this Court to issue a Writ of Certiorari to the Seventh Circuit to review its decision in this case.

II.
The DesPlaines Zoning Ordinance Violates The Establishment Clause: The State Adduced No Evidence Demonstrating A Need To Accommodate Religious Activity Under The Free Exercise Clause

The Distric Court found that the Des Plaines zoning ordinance violated the Establishment clause. It held that:

> "making such a benefit [the exemption from zoning requirements] available only to churches is precisely the kind of subsidy that a majority of Justices found violated the Establishment clause in Texas Monthly, Inc. v. Bullock, 489 U.S. 1..." 742 F. Supp. at 463

The Seventh Circuit reversed. It determined that Bullock was distinguishable and that Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) controlled the case. Petitioner respectfully submits that the Seventh Circuit was wrong on both counts.

The central premise of Bullock was that an ordinance limiting its benefits to religious organizations cannot "appear [] other than as state sponsorship of religion." 489 U.S. at 11. In Bullock, the Court repeatedly emphasized that in all of the cases where exemptions for religious groups have been sustained, "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well." Id. Recounting the holdings in those cases, the Bullock plurality found that in Widmar v. Vincent, 454 U.S. 263 (1981), allowing religious groups to use an open forum in a public university was not tan-

tamount to state approval of religion because the forum was available "to a broad class of nonreligious as well as religious speakers" 454 U.S. at 274. The Bullock Court also described the results in Mueller v. Allen, 463 U.S. 388 (1983) and Walz v. Tax Commission of New York City, 397 U.S. 664 (1970) as a function of the inclusiveness of the statutes involved. In Mueller the Court

> "... deemed it 'particularly significant' [citation ommitted] that the deduction is available for educational expenses incurred by all parents including those whose children attend public schools and those whose children attend nonsectarian private or sectarian private schools" (emphasis in original). Bullock, supra, 489 U.S.at 12 citing, Mueller, supra, 463 U.S. at 397.

Regarding Walz, supra, the Bullock Court stated that:

> "The breadth of New York's property tax exemption was essential to our holding that it was [not sponsorship of religion]..."

489 U.S. at 12.

The Bullock plurality noted that if the benefits of the various laws involved in these cases were

> "confined to religious organizations they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect."

489 U.S. at 11.

Clearly, the law involved here, which creates a specific exemption for religious institutions, fails to pass muster under Bullock.

The Seventh Circuit thought Bullock distinguishable. 8 F. 3d at 492. First, the Appellate Court said by "exempting churches ... from the special use requirement ... the city has removed a burden to the free exercise of religion". Id. The Court failed to specify, however, exactly what burden was being removed. In

Bullock this Court observed that:

> "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdents the claimant's freedom to exercise religious rights."

489 U.S. at 18, citing, Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985).

Here, it may be conceded, as the Seventh Circuit found, that "[t]his country has long recognized the right of religious organizations to educate their youngest members [citations omitted]". 8 F.3d at 492. There was no evidence, however, in the case sub judice that enforcement of a neutrally applied zoning ordinance would have prevented churches from "educating their youngest members". There is nothing about size, signage or safety requirements that is essentially inimical to religious education. In Bullock, the court refused to find that an exemption from taxation for religious Publications was justified as an accommodation under the Free Exercise Clause in large part because "no concrete need to accommodate religious activity ha[d] been shown." 489 U.S. at 18. The State

> "ha[d] adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchases of religious books would offend their religious beliefs or inhibit religious activity. The state cannot therefore claim persuasively that its tax exemption is compelled by the Free Exercise Clause..."

489 U.S. at 18.

Here, the City has adduced no evidence that enforcement of its zoning ordinance would offend religious beliefs or inhibit religious activity. The Seventh Circuit merely assumed that because churches are involved, the Free Exercise Clause was "implicate[d]". 8 F.3d at 492. The assumption is especially

inappropriate in this case, where the evidence shows that it is likely that the existing day care centers operated from churches are actually commercial ventures unaffiliated with religious belief. In short, the Seventh Circuit complitely ignored this Court's admonition in Bullock that there must be an evidentiary showing that religious activity will be inhibited before an exemption will be upheld as required accommodation under the Free Exercise clause.

The Seventh Circuit's second basis for distinguishing Bullock is equally unconvincing. The Court determined that, unlike the circumstances in Bullock, "the costs that would otherwise be borne by churches in obtaining the special use permit are not transferred to the public at large by virtue of the exemption". 8 F.3d at 492. But neither Bullock nor the Court's other cases speak only in monetary terms in this context. It is only those legislative exemptions "that did not or would not impose substantial burdens on nonbendficiaries ..." 489 U.S. at 18 n. 8, that have been sustained. Here, the substantial burden on Petitioner is manifest. She cannot obtain a permit to engage in her otherwise lawful occupation of operator of day care centers. Allowing others who are willing to affiliate with religious organizations a permit, while denying the privilige of a permit to Petitioner is demonstrabley "a substantial burden".

In order to avoid the ineluctable conclusion that the exemption "confers some benefit, albeit indirect, on churches not available to others ..." 8 F.3d at 493, the Seventh Circuit construed the ordinance to provide that church operated day care cinters must be "not for profit" in order to obtain the exemption. 8 F.3d at 493. It is submitted that the Seventh Circuit was without authority to impose this construction, which is actually an unauthorized judicial amendment of the ordinance.

In sum, the Des Plaines ordinance granting religious institutions an exemption from zoning requirements for day care center, violates the Establishment Clause. The city has singled out religion as a beneficiary without justification. The ordinance cannot be sustained as an accommodation required under the Free Exercise Clause because the state adduced no evidence

demonstrating that religion would be burdened by the requirements of the law. The Seventh Circuit failed to respect the teachings of this Court's decision in Bullock that such a law is an unconstitutional subsidy of religion. Accordingly, the Seventh Circuit's decision should be reviewed by Writ of Certiorari.

III.

The Des Plaines Ordinances Violates The Equal Protection Clause

The District Court, noting that a zoning ordinance will be upheld so long as it "is rationally related to a legitimate public interest" (City of Cleburn v. Cleburn Living Center, Inc., 473 U.S. 432, 440 (1985)), nevertheless concluded that Des Plaines' zoning oridnance violated the Equal Protection Clause. Cohen, 742 F. Supp. at 467. The reason for the Court's holding was the city's failure to provide a rational basis for the distinction made by the ordinance between day care centers operated in churches and those operated by everyone else.

The Seventh Circuit found the ordinance rationally related "to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions" 8 F.3d at 494, citing, Amos, supra, 483 U.S. at 339. It also determined that the ordinance was "rationally related to the larger goals of residential zoning". Id at 494.

As to the first of these asserted justifications, the foregoing (supra pp. 11-12) demonstrates that without evidence, that the ordinance would actually interfere with religious belief or activity, the exemption cannot be sustained as an accommodation of religion required by the Free Exercise Clause. There is no evidence here of "significant" governmental interference with religious activity or belief. Therefore, the ordinance is not rationally related to the "accommodation" rationale, nor is the ordinance

sustainable as a regulation rationally related to "the larger goals of residential zoning". According to the Seventh Circuit, the purpose underlying the "zoning" power is the protection of the public from the "ill effects of urbanization, such as crowding, encroachment of commercial businesses or industries, traffic congestion, and noise." 8 F.3d at 494. This purpose is actually frustrated rather than furthered by the ordinance. By permitting the unlimited proliferation of day care centers operated from buildings owned by religious institutions, the ordinance encourages crowding, congestion and/or noise. The City's legitimate interest in using the zoning power to protect the public from the ill effects of urbanization would be advanced by eliminating the exemption. If the exemption were eliminated, all who seek permits to operate day care centers in residential areas would have to meet density, size, traffic and signage requirements. The number of such establishments could be effectively controlled. As it now stands, the city has no say over how many churches will be established or how many day care centers will be operated in those churches. Clearly the potential for excessive traffic, noise and congestion is greater with the exemption than without. The Seventh Circuit's finding that "the city's decision to restrict the operation of day care centers to buildings that concurrently function as churches" (8 F.3d at 495) was rational, fails to take account of the potential for an unlimited number of centers proliferating under the ordinance as written. Petitioner respectfully suggests that the Seventh Circuit's reliance on the "zoning" rationale was not only unwarranted, but illogical. Accordingly, because the ordinance can neither be justified as an accommodation required by the Free Exercise Clause, nor as a law which rationally furthers a legitimate state interest, the Seventh Circuit's decision that the ordinance did not violate the Equal Protection Clause should be reviewed by this Court on Writ of Certiorati.

CONCLUSION

For all of the foregoing reasons Petitioner urges this Court to issue a Writ of Certiorari to the United States Court of

Appeals for the Seventh Circuit

Respectfully submitted,

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 6, 1993.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

HARRIET COHEN,
Plaintiff-Appellee,

No. 92-3503

vs.

CITY OF DES PLAINES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 87 C 9314

Milton I. Shadur, Senior Judge.

O R D E R

On consideration of the petition for rehearing on banc filed in the above-captioned case, no judge in active service has requested a vote, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

No. 92-3503

HARRIET COHEN,

Plaintiff-Appellee,

v.

CITY OF DES PLAINES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 9314—**Milton I. Shadur**, *Senior Judge.*

ARGUED MAY 12, 1993—DECIDED OCTOBER 25, 1993

Before BAUER, KANNE and ROVNER, *Circuit Judges.*

KANNE, *Circuit Judge.* Harriet Cohen sued the City of Des Plaines, Illinois, and various city officials, claiming that a provision of the city's zoning ordinance regulating the use of church property in a residential district violated the Establishment Clause of the First Amendment as well as her right to equal protection of the laws under the Fourteenth Amendment. The district court agreed, granted Cohen's motion for summary judgment, and subsequently awarded her damages. We find that the ordinance offends neither the First nor Fourteenth Amendment and therefore reverse.

I.

Harriet Cohen owns property in the city of Des Plaines on which stands a building formerly used as a church. The property is located within a district designated "R-2," or single-family residential, under the city's zoning ordinance.[1] R-2 districts are reserved primarily for single-family dwellings, but the city's zoning regime permits other uses of property without requiring a special use permit. Paragraph 3.1.2.2 of the ordinance permits "[p]ublic schools, elementary and high or private schools having a curriculum the same as ordinarily given in a public elementary or high school, . . . colleges, junior colleges, or universities." In addition, paragraph 3.1.2.6 permits "[c]hurches, temples, religious reading rooms, rectories and parish houses, *including nursery schools operated in any of such buildings*" (emphasis added). Finally, paragraph 3.1.2.16 allows operation of day care centers in R-2 districts only if the operator first obtains a special use permit from the city and complies with the various size, density, signage and safety requirements set forth in paragraphs 3.1.2.16.1 through 3.1.2.16.15.

Cohen owns and operates day care centers in Des Plaines and Arlington Heights, and initially sought to use her R-2 property to open another day care center. To that end, in April 1987, she filed an application for a special use permit with the city. The Des Plaines Plan Commission recommended to the mayor, city council, and Zoning Board of Appeals that the application be denied. The Zoning Board of Appeals then held a public hearing on the matter, at the conclusion of which the Board voted 6-0 to deny the request for a special use permit. Cohen's application was next taken up by the city council's Municipal Development Committee. The committee recommended that the application be denied by the full council, stating in its report, "The members did not feel that this was a good location [for a day care center] because all around the property

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[1] The Des Plaines zoning ordinance was enacted in 1960 and amended in 1977.

in question is residential use." On September 21, 1987, the mayor and city council voted unanimously to deny Cohen's application.

Cohen sued the city and various city officials claiming that the city's zoning ordinance violated, among other things, the First Amendment's Establishment Clause and the Fourteenth Amendment's Equal Protection Clause. Both parties moved for summary judgment, which the district court granted to Cohen. *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990). The court noted that in her Statement of Material Facts, Cohen had listed seven day care facilities that she claimed operated in religiously-affiliated buildings in areas zoned for residential use. Four of the centers were located in R-2 single-family districts, one in an R-4 multi-family district, and two in R-5 multi-family districts. *Id.* at 462-63. According to Cohen, each of the centers charged a fee for its services, advertised in the local yellow pages, and was licensed by the State to operate as a day care facility. Moreover, at least one was operated by a "for profit corporation." None, however, by virtue of their affiliation with a church, were required to obtain a special use permit from the city. *Id.* at 463.

The city contested that these facilities were day care centers under paragraph 1.2.17 of the zoning ordinance, which defines a "day care center" as

> [a] specifically designed, reconstructed or remodeled structure other than a single-family residence simultaneously occupied by a single family, and licensed by the State of Illinois, providing day care services for compensation for more than eight (8) children during the day.

The city's zoning ordinance does not define "nursery school." The district court found that "there [was] no material difference between the *activities* engaged in by nursery schools and day care centers." *Cohen*, 742 F. Supp. at 464. The city had "failed to identify any material difference between the manner in which the facilities in

church buildings that City calls 'nursery schools' provide child care services for a fee and the manner in which a 'day care center' such as Cohen's would provide those same services." *Id.* at 465.

Turning to the merits of the parties' arguments concerning the equal protection claim, the court determined that the city had "utterly failed to proffer any convincing reason for the distinction made by the Ordinance." *Id.* at 467. Indeed, the court found that the city had presented no evidence from which to rationally conclude that "church-affiliated child care facilities would have less of a detrimental impact on a residential neighborhood than any other day care center." *Id.* at 468. Thus, the court concluded that the ordinance violated the Fourteenth Amendment.

The court next considered Cohen's Establishment Clause claim. Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), the court found that the Des Plaines ordinance confers a benefit upon churches operating child care facilities on their premises that is unavailable to others who wish to operate day care centers in residential areas. *Cohen*, 742 F. Supp. at 470-71. The court concluded that "the sole effect of City's Ordinance is to lift from religious organizations, without any rational justification, a regulatory burden that is uniformly applicable to day care operators generally." *Id.* Accordingly, the ordinance violated the Establishment Clause.[2]

The court subsequently held a bench trial to determine Cohen's damages. In the end, the court determined that Cohen was entitled to $824,793.15, comprising lost profits, loss of opportunity to establish a day care business, expenses incurred in attempting to obtain a special use permit, expenses relating to maintaining the property she owned, and emotional distress. The city filed a timely appeal and we have jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] The court also considered and rejected Cohen's claim that the ordinance violated her rights to substantive due process. Cohen does not appeal that decision.

II.

The City appeals both the merits of the district court's decision as well as the award of damages. We find it necessary only to address the Establishment Clause and equal protection issues. In fact, because we find that an analysis of Cohen's Establishment Clause claim is largely dispositive of her equal protection complaint, we address the issues in that order.

Ordinarily, we review motions for summary judgment *de novo* to determine if a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249-52, 106 S. Ct. 2510-12 (1986). In this case, the parties do not dispute the district court's factual findings, only the application of law to those facts.[3] Because the city does not contend that there is a genuine issue of material fact, but only that it is entitled to judgment as a matter of law on the record established in the summary judgment proceeding, we review the district court factual findings under the clearly erroneous standard. *See May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986). We cannot say that the district court's factual findings are clearly erroneous. Accordingly, we accept the finding that the city has allowed four facilities to provide child care services in R-2 districts without special use permits. We also accept the finding that there is no functional difference between day care centers and nursery schools for purposes of Des Plaines' zoning ordinance. That said, we turn to the merits.

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[3] In its brief to this court, the city maintained that there is a difference between day care centers and nursery schools and that the district court's factual finding on this point was error. However, in response to a question at oral argument, counsel for the city conceded that no distinction existed, but argued that this court did not need to rely on any difference in order to rule that the ordinance was constitutional.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I, cl. 1. The Establishment Clause prohibits the government from promoting or affiliating with any religious doctrine or organization, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590, 109 S. Ct. 3086, 3099 (1989), and "is a specific prohibition on forms of state intervention in religious affairs . . . ." *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 2657 (1992).

As did the district court, we analyze the plaintiff's argument against the zoning ordinance using the trilogy of tests developed by the Supreme Court in *Lemon*. Though rumors of *Lemon*'s demise have abounded in the past several years, *see e.g.*, *Lee v. Weisman*, ___ U.S. at ___, 112 S. Ct. at 2687 (Scalia, J., dissenting); *Allegheny*, 492 U.S. at 655-56, 109 S. Ct. at 3134 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-49, 107 S. Ct. 2862, 2874-75 (1987) (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 636-40, 107 S. Ct. 2573, 2605-07 (1987) (Scalia, J., dissenting); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400, 105 S. Ct. 3216, 3248 (1985) (White, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-114, 105 S. Ct. 2479, 2516-19 (1985) (Rehnquist, J., dissenting), the Court recently admonished that they are exaggerated. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, ___ U.S. ___, 113 S. Ct. 2141, 2148 n.7 (1993). *Lemon*, then, remains the operative standard. *See Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 234-35, 110 S. Ct. 2356, 2364 (1990).

According to the *Lemon* test, the Des Plaines ordinance must (1) have a secular purpose; (2) neither advance nor inhibit religion in its principal or primary effect; and (3) not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111. The Supreme Court has refined the analysis under the first two prongs of

Lemon, focusing on "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in [the Court's] Establishment Clause jurisprudence." *Allegheny*, 492 U.S. at 592, 109 S. Ct. at 3100. *See also Gonzales v. North Township of Lake County, Indiana*, No. 92-3217, slip op. at 11 (7th Cir. September 10, 1993).

Thus, "the prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*.' " *Allegheny*, 492 U.S. at 593, 109 S. Ct. at 3101 (quoting *Wallace v. Jaffree*, 472 U.S. at 70, 105 S. Ct. at 2497 (O'Connor, J., concurring in the judgment)). "Endorsement" in this context is akin to "promotion." *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 691, 104 S. Ct. 1355, 1368 (O'Connor J., concurring) (1984)). And yet we have noted that "[t]he concept of 'endorsement' is fluid, and varies from case to case." *Gonzales*, slip op. at 11. Consequently, our inquiry into the constitutionality of the Des Plaines ordinance under the First Amendment necessarily "calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678, 104 S. Ct. at 1362.

" 'The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion.' " *Edwards*, 482 U.S. at 585, 107 S. Ct. at 2578 (quoting *Lynch*, 465 U.S. at 690, 104 S. Ct. at 1368 (O'Connor, J., concurring)).

> This does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement "that the government show a callous indifference to religious groups," *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, 684, 96 L.Ed. 954 (1952), and the Establishment Clause has never been so interpreted. Rather, *Lemon*'s "purpose" requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Amos, 483 U.S. at 335, 107 S. Ct. at 2868.

We will defer to a municipality's sincere articulation of a secular purpose. *Edwards*, 482 U.S. at 586, 107 S. Ct. at 2579. This is in keeping with the well settled maxim that courts are "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95, 103 S. Ct. 3062, 3067 (1983). *See also Illinois v. Krull*, 480 U.S. 340, 351, 107 S. Ct. 1160, 1168 (1987) (courts presume that legislatures act in a constitutional manner); *Clements v. Fashing*, 457 U.S. 957, 963, 102 S. Ct. 2836, 2843 (1982) (plurality opinion) (same). This is true whether the governing body is a state legislature or a city council.

The sparse legislative history of the city's ordinance reveals precious little about its purpose. *See Cohen*, 742 F. Supp. 464 n.20, 468 & n.25 (discussing 1977 amendments to ordinance). Nonetheless, the city asserts that the ordinance, by exempting day care centers operated in churches[4] from the special use permit requirement, reduces governmental interference with religious organizations and their decision making processes. Thus, the city relies on the Supreme Court's holding that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335, 107 S. Ct. at 2868.

Cohen challenges this asserted purpose, essentially relying on the district court's determination that

> City's exemption applies to all day care centers in church buildings regardless of whether they teach religion at all. Furthermore, there is no evidence

[4] Throughout this opinion, for the sake of brevity, the term "church" is generically used to refer to all buildings referred to in ¶ 3.1.2.6 of the Des Plaines Zoning Ordinance.

> that any of the facilities operating pursuant to City's exemption view their child care functions as pastoral.

Cohen, 742 F. Supp. at 471.

We do not think that whether the ordinance satisfies *Lemon*'s secular purpose requirement can depend on a district court's decision that a particular church does not view its endeavor either to educate or care for young children as sufficiently pastoral. Moreover, we are wary of holding that the Des Plaines' ordinance would pass muster under *Lemon*'s purpose requirement only if it stated that nursery school and day care center activities must be "religious" in nature. First, it is not up to legislatures (or to courts for that matter) to say what activities are sufficiently "religious." Any legislative or judicial attempt at such a definition would surely fail. Worse, it would almost certainly undercut the neutral posture required of every branch of government under the Establishment Clause.

Second, it is clear that the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization. *Amos* makes precisely this point. There, a building engineer who worked for a nonprofit gymnasium operated by religious entities associated with the Church of Jesus Christ of Latter-day Saints was discharged because he failed to qualify for a certificate that he was a member of the Church and eligible to attend its temples. *Amos*, 483 U.S. at 330, 107 S. Ct. at 2865. The employee, with others purporting to represent a class, sued the religious entities of the Church operating the gym, alleging religious discrimination in violation of Title VII. *Id.* at 331, 107 S. Ct. at 2865.

The defendants moved to dismiss the suit on the ground that they were shielded from liability by section 702 of the Act, which exempts religious organizations from Title VII's prohibition of religious discrimination in employment. *Id.*

at 331, 107 S. Ct. at 2866. The plaintiffs contended that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, section 702 violated the Establishment Clause. *Id.* The Court, employing the *Lemon* test, found that section 702 had a secular purpose because it sought to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335, 107 S. Ct. at 2868. Moreover, Congress "acted with a legitimate purpose in expanding the section 702 exemption to cover *all* activities of religious employers." *Id.* at 339, 107 S. Ct. at 2870 (emphasis added). In so holding, the Court observed that

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336, 107 S. Ct. at 2868 (footnote omitted).

Concurring with the Court's decision, Justice Brennan elaborated on this point:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers religious freedom as well.

Id. at 342, 107 S. Ct. at 2872 (Brennan, J., concurring in the judgment).

We think that Des Plaines' zoning ordinance has the secular purpose of minimizing governmental meddling in re-

ligious affairs notwithstanding that the ordinance does not explicitly state that nursery schools (or day care centers) operated in churches in residential areas must give care or instruction defined as "religious." History and common sense teach that the care and education of young children fall within the mission of most, if not all, religious organizations. Sunday schools provide one obvious example of the way churches minister to pre-school youth.

Under the second requirement of *Lemon*, the ordinance must have a "principal or primary effect . . . that neither advances nor inhibits religion." 403 U.S. at 612, 91 S. Ct. at 2111. At the core of this requirement is the notion that

> government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 109 S. Ct. 890, 896 (1989). *See also Allegheny*, 492 U.S. at 593-94, 109 S. Ct. at 3101.

This view of government neutrality is in keeping with the Court's recognition of the tension inherent in the Establishment and Free Exercise Clauses of the First Amendment. *See Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 788, 93 S. Ct. 2955, 2973 (1973); *Norwood v. Harrison*, 413 U.S. 455, 469, 93 S. Ct. 2804, 2813 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677, 91 S. Ct. 2091, 2095 (1971). The juxtaposition of the two clauses, and the internal tension they create, makes total separation between religion and government impossible. *Lynch*, 465 U.S. at 673, 104 S. Ct. at 1359; *Lemon*, 403 U.S. at 614, 91 S. Ct. at 2112. Indeed, "[i]t has never been thought either possible or desirable to enforce a regime of total separation" between religion and government. *Nyquist*, 413 U.S. at 760, 93 S. Ct. at 2959. Thus the Court has

recognized that the First Amendment "affirmatively mandates accommodation," *Lynch*, 465 U.S. at 673, 104 S. Ct. at 1359, and "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm. of Florida*, 480 U.S. 136, 144-45, 107 S. Ct. 1046, 1051 (1987) (footnote omitted).

With respect to the principal or primary effect test, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337, 107 S. Ct. at 2869. We do not think that the Des Plaines ordinance, by allowing churches to operate nursery schools and day care centers without a special use permit, puts the city in the position of "establishing" religion within the meaning of the First Amendment any more than either the property tax exemption for religious organizations at issue in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 90 S. Ct. 1409 (1970), or the tax deduction for the expenses of religious education at issue in *Mueller*, 463 U.S. at 388, 103 S. Ct. at 3062 constituted state establishment of religion. "The Establishment Clause prohibits 'sponsorship, financial support, and active involvement of the sovereign in religious activity." *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 393, 110 S. Ct. 688, 697 (1990) (quoting *Walz*, 397 U.S. at 668, 90 S. Ct. at 1411). The religious component of child care and education activities in Des Plaines will come from church members or leaders, not from government officials. Thus, "we do not see how any advancement of religion achieved by [the operation of nursery schools and day care centers] can be fairly attributed to the Government, as opposed to the Church[es]." *Amos*, 483 U.S. at 337, 107 S. Ct. at 2869 (footnote omitted).

We do share the district court's concern about the commercial benefit that the Des Plaines ordinance might con-

fer upon churches in R-2 districts. Specifically, relying on *Bullock*, the court was concerned that the ordinance provided a subsidy to churches. *See Cohen*, 742 F. Supp. at 471. In *Bullock*, the Supreme Court invalidated a Texas statute that exempted from the state's sales and use tax "periodicals published or distributed by a religious faith consist[ing] entirely of writing promulgating the teaching of the faith, along with books consisting solely of writings sacred to a religious faith . . . ." 489 U.S. at 5-6, 109 S. Ct. at 894. In a plurality opinion, Justice Brennan found that the state's subsidy was not required by the Free Exercise Clause and could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . ." *Id.* at 15, 109 S. Ct. at 899. Accordingly, "[i]t [was] difficult to view Texas' narrow exemption as anything but a state sponsorship of religious belief". *Id.* at 15, 109 S. Ct. at 900.

We think this case is distinguishable from *Bullock* in two important respects. First, allowing churches to provide child care and educational services coheres with the religious missions of most churches and thus implicates rights protected by the Free Exercise Clause. This country has long recognized the right of religious organizations to educate their youngest members, *see Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972); *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925); *see also Meyer v. State of Neb.*, 262 U.S. 390, 43 S. Ct. 625 (1923), and while there may be some difference between formal education and learning attendant to child care, we do not think it is a constitutional difference. It cannot be doubted that the same persons who would seek to have their children educated in religious schools (including nursery schools) would also entrust their youngest children to be cared for by those who are adherents of their religious beliefs. By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools and day care centers, the city has removed a bur-

den to the free exercise of religion. *See Amos*, 483 U.S. at 338, 107 S. Ct. 2869.[5]

Second, the Des Plaines zoning ordinance exemption does not require the general populace to subsidize religious organizations. In *Bullock*, the Supreme Court found that the sales and use tax exemption "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications." 489 U.S. at 18 n.8, 109 S. Ct. at 902 n.8. In effect, nonbeneficiaries subsidized the efforts of religious organizations to propagate their faiths. By contrast, the Des Plaines zoning ordinance exemption has no such effect. The costs that would otherwise be borne by churches in obtaining the special use permit are not transferred to the public at large by virtue of the exemption.

Nonetheless, we recognize that exemption from the requirements of a special use permit confers some benefit, albeit indirect, on churches not available to others who would seek to establish day care centers in residentially zoned districts. Thus, we believe that, in order to be consistent with the holdings in *Bullock* and in particular *Amos*, the Des Plaines ordinance must be read to require that church operated nursery schools and day care centers be not-for-profit. *Amos* upheld section 702's exemption "as applied to the nonprofit activities of religious employers . . . ." 483 U.S. at 339, 107 S. Ct. at 2870. In that case, members of the Court noted important distinctions between nonprofit and for-profit activities for purposes of free exercise analysis. Justice Brennan wrote:

> The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities. The

[5] The burden is not just in the cost of a permit. The special use permit requires that any building used as a day care facility meet certain size, density, signage, and safety requirements. *Cohen*, 742 F. Supp. at 460-61 & n.6.

> fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.

Id. at 344, 107 S. Ct. at 2872-73 (Brennan, J., concurring in the judgment) (citation and footnote omitted).

Justice O'Connor expressed a similar concern, noting that

> [b]ecause there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.

Id. at 349, 107 S. Ct. at 2875 (O'Connor, J., concurring).

By requiring church operated nursery schools and day care centers to be not-for-profit, we eliminate the problem, noted by Justice Brennan in *Bullock*, of government " 'provid[ing] unjustifiable rewards of assistance to religious organizations . . . .' " 489 U.S. at 15, 109 S. Ct. at 899 (quoting *Amos*, 483 U.S. at 348, 107 S. Ct. at 2875).

We hold that the Des Plaines ordinance does not have the principal or primary effect of advancing religion. Yet,

mindful of the well settled principle that statutes should be interpreted to avoid constitutional difficulties, *see, e.g., Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 2241 (1989); *Frisby v. Schultz*, 487 U.S. 474, 482-83, 108 S. Ct. 2495, 2501 (1988); *United States v. Witkovich*, 353 U.S. 194, 202, 77 S. Ct. 779, 783 (1957), we construe the ordinance to require that, in order to be exempt from the special use requirement, church operated nursery schools or day care centers must be not-for-profit.

We turn next to *Lemon*'s final requirement, that the ordinance "must not foster 'an excessive entanglement with religion.' " 403 U.S. at 613, 91 S. Ct. at 2111 (quoting *Walz*, 397 U.S. at 674, 90 S. Ct. at 1414). This inquiry requires examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615, 91 S. Ct. at 2112. While "entanglement between the state and religion is simply a question of kind and degree," *Gonzales*, slip op. at 21 (citing *Lynch*, 465 U.S. at 684, 104 S. Ct. at 1365), it is difficult to conceive how the Des Plaines ordinance impermissibly entangles city and church. Indeed, as construed, the ordinance effectuates a separation between the two and avoids intrusive inquiry into religious belief and practice. *See Amos*, 483 U.S. at 339, 107 S. Ct. 2870.

Cohen complains that the ordinance "leaves open the opportunity for City to selectively enforce its ordinance, depending on its attitude toward a particular religious group." Moreover, according to Cohen, under the ordinance's exemption, the city "has the right to determine what constitutes a 'nursery school' operating 'in conjunction with' a 'church operation.' The first point has no basis in the record, and states a charge that could be applied to almost any municipal ordinance or state law. We point out that nothing in the text of the Des Plaines ordinance gives the city the discretion to apply the ordinance in favor of certain religious organizations and against others.

While it is true that the ordinance does define "day care center" but not "nursery school," Cohen's second objection is essentially a variation of the first. However, there is no claim in the record that the city has in fact discriminated among religious organizations in determining what church operated endeavor constituted a "nursery school."[6] Indeed, there is no evidence at all of contact between city officials and religious officials concerning the character of church operated day care or nursery school activities in Des Plaines. In short, the zoning ordinance does not create the kind of government surveillance of religious activities or cooperation between government and religious officials that has been deemed an impermissible administrative entanglement under *Lemon*.

III.

Turning briefly to Cohen's equal protection claim, we ask whether the Des Plaines City Council has chosen a rational classification to further a legitimate end with its zoning ordinance. *See Amos*, 483 U.S. at 339, 107 S. Ct. at 2870. We find that, inasmuch as the exemption from the special use permit requirement applies only to not-for-profit church operated nursery schools and day care centers, the ordinance is rationally related to the legitimate purpose of "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* The ordinance's exemption from the special use requirement is a "rational means of creating a buffer between church and state." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1400 (4th Cir.), *cert. denied*, 498 U.S. 846, 111 S. Ct. 131 (1990).

However, we also find that the ordinance is rationally related to the larger goals of residential zoning. Cohen

[6] Even if there were, Cohen, as one seeking to open a day care center, would lack standing to raise it.

does not challenge the permitted use of a church in a R-2 district without the requirement of a special use permit. Rather, she challenges the fact that churches already operating in R-2 districts are, in turn, allowed to operate day care centers without obtaining special use permits. Surely it is not irrational for the city to believe that allowing day care centers to operate without a special use permit in buildings *already used* to provide a service to some members of the community serves the purposes of residential zoning.[7] As the city argued to the district court:

> If the intensity of a day care center is not restricted, the commercial nature of an unrestricted use will then encroach upon the enjoyment of the single family residential area and have a detrimental effect upon the values of the single family homes.

A city may use zoning regulations as an exercise of the police power to protect residents from the ill effects of urbanization, such as crowding, encroachment of commercial businesses or industries, traffic congestion, and noise. *See Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 2142 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95, 47 S. Ct. 114, 120-21 (1926). "The preservation of a desirable community impels a priority of the community's needs over the needs of those who would conduct commercial transactions in the community as they see fit, so long as those community needs are reasonably established and the means chosen to meet them do not infringe upon the fundamental con-

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[7] We note that day care centers and nursery schools may be operated in buildings that already function as public schools located in R-2 districts in Des Plaines. Paragraph 3.1.2.2 of the zoning ordinance allows the operation of public and private schools in R-2 districts without the requirement of a special use permit. Illinois law provides that public schools may establish the equivalent of day care centers. *See* Ill. Rev. Stat. ch. 122, para. 10-22.18(a) (1991). Moreover, public schools may establish and operate nursery schools. *Id.* ch. 122, para. 10-23.2.

stitutional rights of individual businessmen." *Linmark Ass'n, Inc. v. Township of Willingboro*, 535 F.2d 786, 796-97 (3rd Cir. 1976), *rev'd on other grounds*, 431 U.S. 85, 97 S. Ct. 1614 (1977). The city's decision to restrict the operation of day care centers without a special use permit to buildings that concurrently functioned as churches was rational. Moreover, even if we were to find that "the validity of the legislative classification for zoning purposes [was] fairly debatable, the legislative judgment must be allowed to control." *Euclid*, 272 U.S. at 388, 47 S. Ct. at 118.

Having found that the city's zoning ordinance does not violate the First or Fourteenth Amendment, we need not address the parties' other contentions.

IV.

As applied to not-for-profit nursery schools and day care centers operated by churches located in R-2 single-family residential districts, the Des Plaines zoning ordinance does not violate either the Establishment Clause of the First Amendment or Cohen's right to equal protection of the laws. The decision of the district court granting Cohen's motion for summary judgment is REVERSED. The city's cross-motion for summary judgment is REMANDED with directions to the district court to enter judgment for the city consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

HARRIET COHEN,
Plaintiff,
v.
CITY OF DES PLAINES, et al.,
Defendants.

No. 87 C 9314

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court's June 29, 1990 memorandum opinion and order (the "Opinion," 742 F.Supp. 458) granted the Fed. R. Civ. P. ("Rule") 56 motion of Harriet Cohen ("Cohen") for summary judgment as to liability, holding that she was entitled to recover against City of Des Plaines ("City") by reason of its unconstitutional conduct. This Court has now conducted a bench trial to determine the amount of damages to be awarded to Cohen. Before that trial the parties jointly submitted, and this Court approved on June 26, 1991, a final pretrial order ("FPTO"). Since the trial the parties have respectively submitted proposed findings of fact ("Findings") and Conclusions of Law ("Conclusions").

To the extent (if any) that the Findings below may be deemed conclusions of law, they shall also be considered Conclusions. In the same way, to the extent (if any) that matters later expressed as Conclusions may be deemed findings of fact, they shall also be considered Findings. In both those respects, see Miller vs. Fenton, 474 U.S. 104, 113-14 (1985).

Findings of Fact

1. All facts set out in the Opinion, 742 F.Supp. at 459-62 are

uncontroverted and are part of the predicate for these Findings and Conclusions. They are accordingly incorporated by reference into these Findings. In addition, drawing from FPTO Ex. 1, this Court finds:

(a) City is a home rule Illinois municipal corporation.

(b) Cohen owns real estate (the "Property") having a total area of 18,793.75 square feet (.43 acres) and located at 1495 Prospect Avenue in a residential district of City. When Cohen acquired the Property it was already improved with a building formerly used as a church, having a total area of 6,067 square feet.[1]

(c) Substantial renovation would be required to establish a day care center in the Property. Cohen hired architect Daniel McGrath ("McGrath") to prepare plans and specifications to renovate the Property for use as a day care facility so that Cohen could operate a day care business there.

(d) Day care centers in Illinois must be licensed by the Illinois Department of Children and Family Services ("DCFS").

(e) On or about April 13, 1987 Cohen filed an application for a special use permit with City seeking permission to operate a day care center in the Property.

(f) Cohen engaged the services of architect McGrath and of attorneys to represent her in the special use permit application process.

(g) After hearings before City's Plan Commission, its Zoning Board of Appeals, its Municipal Development Committee and a Committee of the whole City Council, Cohen's application for a special use permit was finally denied on September 21, 1987. Opinion, 742 F.Supp. at 461-62 sets out the facts as to those proceedings.

(h) Cohen has not been able to establish a day care center in the Property, which remains vacant to this day.

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[1] These Findings and Conclusions will "Property" to refer both to the entire parcel of real estate and to the building located on the parcel. No confusion should be created by the dual usage, for the context in which the term is used should make plain which of the meaning is involved in each instance.

2. Cohen is qualified by education, training and experience to operate a day care center. She holds a B.S. degree in early child care technology from the University of Cincinnati, and DCFS has found her qualified to act as a day care center director.

3. Cohen has been in the business of owning and operating day care centers since 1982, having operated one such center in Des Plaines and another in Arlington Heights, Illinois. Those other day care operations have been conducted by an Illinois corporation, Unlimited Children's Learning Center Corp. ("Unlimited"), of which Cohen is sole shareholder and President.

4. Cohen wished to use the Property to own and operate another day care center. However, by reason of City's imposition on Cohen of City's unconstitutional special use permit process, Cohen was wrongfully denied the opportunity to establish the day care center in the Property in a timely fashion, when she believed (and when the facts have since demonstrated) that it would be appropriate and profitable for her to do so.

5. This Court credits the testimony of Cohen's architect McGrath that the Property is situated near a park and public school, that it has an automobile parking area for sheltered pickup and dropoff of young children, that the church building's basic design was readily adaptable for use as a child care facility and that although the building was in need of extensive repairs to satisfy the DCFS requirements, it was structurally sound and could easily accommodate the required renovations. Accordingly the Property is suitable for the operation of a day care center, and DCFS would have licensed the Property for a capacity of 104 children.

6. This Court also credits the testimony of architect McGrath that the reasonable cost of the required repairs and renovations was $189,000, that the reasonable length of time required to complete the building permit process and the repair work was approximately 12 weeks and that but for the unconstitutional special use permit process imposed upon Cohen by City, the Property would have been ready for occupancy and use as a day care center by August 1, 1987.

7. At the time of trial Cohen's counsel advised this Court that expert witness Neil King ("King"), a real estate appraiser, had been seriously injured when struck by an automobile on the day before his scheduled testimony and was therefore unable to testify in person. Based on his unavailability, counsel for the parties agreed that

portions of King's deposition could be received in evidence. King there testified, and this Court finds, that in 1987 and thereafter the reasonable fair market rental value of the Property for use as a day care center was $7.50 per square foot of building on a net basis, or $45,000 per year, with the leases obligated to pay real estate taxes and occupancy expenses.

8. On or about June 19, 1989 (after this case was on file) Cohen, in an attempt to mitigate her damages, entered into a 10-year lease agreement with Children's Learning World, a Montessori School, Inc. (the "Montessori School"). Under that agreement the Montessori School undertook to lease the Property at a base net rent of $7.50 per square foot of building for the initial term of July 1, 1989 through June 1, 1992, with incremental increases of $0.25 per square foot on July 1, 1992 and on July 1 every two years thereafter. City admits that the proposed use of the Property by the Montessori School constituted a "permitted use" under City's Zoning Ordinance.

9. Montessori School's lease was contingent upon Cohen's making the renovations and repairs necessary to accommodate the Montessori School by September 1, 1989. Based on the testimony of architect McGrath, this Court finds that those repairs and renovations are substantially the same as required by DCFS for use as a day care center. Cohen had architect McGrath promptly prepare plans and make application for a building permit to perform the Montessori School repairs and renovations. However, the building permit was not issued, the repairs and renovations were not made and the lease did not go into effect.

10. Based on the testimony of architect McGrath, this Court further finds that on Cohen's behalf he submitted plans and drawings on three separate occasions in attempts to obtain a building permit from City for Cohen's repair and renovation of the Property:

> (a) In April 1987 McGrath submitted the first set of plans to City in connection with the special use zoning process for Cohen's proposed operation of a day care center.
> (b) Later McGrath submitted the second set of plans to City in an effort to obtain its approval to make needed repairs, such as roof repairs and rubbish cleanup, without regard to the ultimate use to which the Property would be put.
> (c) In 1989 McGrath submitted the third set of plans to City in connection with the proposed lease of the Property by the Montessori School.

Architect McGrath was told by employees of City that his actions were futile: City Permit Coordinator Vern Chase told McGrath that

"the powers that be" were never going to permit a day care center at that location and that the process was going to be dragged out, and Building Commissioner Robert McKoveck told McGrath that no matter what he did Cohen was not going to be allowed to get a permit to operate a day care center or the Montessori School on the Property.

11. It is clear from the evidence (a) that the operation of a day care center in the Property was feasible on August 1, 1987 and thereafter and (b) that if Cohen had not been prevented from operating her day care center in the Property by City's wrongful application of the unconstitutional provisions of its ordinance, that business could have been operated at a profit. Cohen's evidence consisted in principal part of the expert testimony of market analyst and demographer John Melaniphy ("Melaniphy") and accountant Thomas O'Brien ("O'Brien").

12. Melaniphy conducted an extensive study as to the availability of a market share of children for a day care center in the Property for the period from August 1, 1987 to June 30, 1992, including:

(a) an inspection of the Property and its environs;

(b) a driving time study to and from the Property;

(c) visits to and communications with competitive and also (to gather added information) with other not-directly-competitive day care centers;(d) visits to City officials and to the local Chamber of Commerce;

(e) consultation with representatives of the United States Post Office serving the area where the Property is located, and analysis of post-office information;

(f) a review of birth and death statistics;

(g) a review of local elementary school enrollment information by school and grade level;

(h) a review of information from DCFS as to currently operating day care facilities within City; and

(i) a review of the census tracts within a three-mile radius of the Property to determine the population between the ages, of 2 and 6 years, and to determine the proposed day care center's market share of the population between those ages, for the period from August 1, 1987 to June 30, 1992.

With respect to the visits and communications referred to in Finding 12(c), Melaniphy not only communicated with competitive

day care centers within a three-mile radius of the Property but also made inquiries of a total of 55 day care centers to obtain estimates as to attendance, tuition, revenue and the ratio of expenses to gross income.

13. In reliance upon his extensive experience, and based upon the results of his research and investigation, Melaniphy prepared a report that included (a) a description of his methodology, (b) a market area map, (c) a list of competitive day care centers, (d) population by census tracts within a three-mile radius of the Property for (i) children less that age 5 and (ii) children aged 5 to 9, (d) birth and age forecasts and (f) estimates as to enrollments, charges, gross revenues, ratios of expenses to gross revenues and lost profits that Cohen could reasonably have realized from the operation of the day care center in the Property if she had been allowed to begin such operations on April 1, 1987 and to continue through June 30, 1992. By agreement of the parties Melaniphy's report, except for its pages B-5, B-8 and B-9, was received in evidence as P. Group Ex. 16.

14. Based on Melaniphy's experience, research and investigation he testified that:

(a) As a matter of location, the Property is ideally situated for the profitable operation of a day care center business, being near major traffic arteries in the north-south driving pattern for persons employed at O'Hare Airport and other significant industrial and commercial operations in the area.

(b) For a day care center located in the Property, the primary market range would lie within an approximate three-mile radius from the Property. There are 16 competitive day care facilities within that market range.

(c) During the 1987 to 1992 period, two of the competitive day care centers within that market range increased their enrollment by a total of 180 additional children.

(d) During the last five months of 1987 Cohen would reasonably have captured within that market range an enrollment of approximately 49 children under the age of 5 and approximately 15 children in the age 5 to 9 category, for a total primary enrollment of approximately 64 children.

(e) In addition to that primary market range, the location of the Property near a large commercial-industrial area and within the north-south traffic flow pattern for persons trav-

eling to and from their jobs creates an additional or "secondary" source of children for day care services on the Property.

(f) During the last five months of 1987 Cohen would reasonably have captured an enrollment of approximately nine children from that secondary source, bringing the total enrollment to approximately 73 children.

(g) During the last five months of 1987 an average weekly rate per child for day care services would have been $70. Accordingly Cohen would reasonably have realized gross revenue from a day care operation in the Property of $102,403 during the last five months of 1987.

(h) Cohen would reasonably have experienced an increase in enrollment or market share for the full year 1988 as a result of the business having been established for five months in 1987. That would reasonably have produced during 1988 a primary enrollment of approximately 79 children and a secondary enrollment of approximately 15 children, for a total enrollment of approximately 94 children.

(i) In 1988 the average weekly rate for day care services increased to $74 per child. Accordingly Cohen would reasonably have realized gross revenue from a day care operation in the Property of $370,447 in 1988.

(j) As a result of the continuity of operation of a day care center in the Property, Cohen would reasonably have experienced a further increase in enrollment or market share for the full year 1989. That would reasonably have produced a primary enrollment of approximately 75 children and a secondary enrollment of approximately 24 children, for a total enrollment of approximately 99 children.

(k) In 1989 the average weekly rate for day care services increased to $76 per child. Accordingly Cohen would reasonably have realized gross revenue from a day care operation in the Property of $391,268 in 1989.

(l) With two years and five months of prior market exposure and day care center operation in the Property, Cohen would reasonably have experienced a further increase in enrollment or market share for the full year 1990. That would reasonably have produced a primary enrollment of

approximately 84 children and a secondary enrollment of approximately 20 children, for a total enrollment of approximately 104 children.

(m) In 1990 the average weekly rate for child care services increased to $85 per child. Accordingly Cohen would reasonably have realized gross revenue from a day care operation in the Property of $443,245 in 1990.

(n) In 1991 the effects of the recession also impacted upon the child care industry. As a result Cohen would reasonably have experienced a reduction in primary enrollment to approximately 73 children and a reduction in secondary enrollment to approximately 17 children, for a total enrollment of approximately 90 children.

(o) Despite those recessionary pressures, the average weekly rate for day care services increased in 1991 to $90 per child. Accordingly Cohen would reasonably have realized gross revenue from a day care operation in the Property of $419,801 in 1991.

(p) Although the recession has carried into 1992, it had not at the time of trial impacted upon the day care business with an appreciably greater degree of intensity. As a result Cohen would reasonably have experienced a primary enrollment of approximately 73 children and a secondary enrollment of approximately 14 children, for a total enrollment of approximately 87 children for 1992.

(q) In 1992 the average weekly rate for day care services increased to $93 per child. Accordingly Cohen would reasonably have realized gross income from a day care operation in the Property of $102,159 during the first quarter of 1992.

(r) Day care center businesses generally operate on a 75% to 80% expense-to-gross-profit ratio, with rent included in the expenses, leaving a net profit margin of 15% to 20% of gross revenues. Melaniphy's opinion is that a 20% ratio of net profit to gross revenues is reasonable, and this Court so finds.

(s) To bring to present value the lost profits of which Cohen was deprived by reason of City's wrongful conduct, Melaniphy used an interest rate factor based on the average

prime rate in effect for the years in question. That rate was obtained from the Federal Reserve Board, and the estimated lost profits were multiplied by that rate compounded monthly.

(t) Although Melaniphy's report (P. Ex. 16) had ended with the first quarter of 1992 (having been prepared in contemplation of an earlier trial date), in his testimony he extended the lost profit calculations through the second quarter of 1992 by employing the same methodology. This is a summary for the second quarter of 1992:

Income	$102,159.00
Expenses	$ 81,727.00
Lost Net Income	$ 20,432.00
Interest Rate	$ 6.50%
Net Present Value	$ 20,652.00

(u) Appendix 1 to these Findings and Conclusions summarizes the gross revenues, expenses, lost net income, interest rates and net present values for the period from August 12, 1987 through June 30, 1992, based upon Melaniphy's Report (P. Ex. 16 at B-10) as modified and supplemented by his testimony as to the second quarter of 1992.

15. In addition to Melaniphy's testimony, Cohen introduced evidence from accountant O'Brien as to the estimated gross evidence from accountant O'Brien as to the estimated gross revenues and expenses and the resulting net profit that would have been realized from operations in the Property from August 1, 1987 through June 30, 1992, if Cohen had not been wrongfully prevented from operating her day care center business there. O'Brien is experienced in general accounting and preparation of tax returns for three day care businesses operated in the south suburbs of Chicago. O'Brien has been an accountant for 24 years, holding a B.S. degree in accounting from the Walton School of Commerce in Chicago, and is a principal in charge of the small division of the accounting firm of Klayman & Korman.

16. Based upon his knowledge of accounting and his experience with the day care center business, O'Brien prepared a report as to the estimated net profits that Cohen would reasonably have realized form a day care center business at the Property if she had been

allowed to commence operations on August 1, 1987 and to continue through June 30, 1992. O'Brien's report was admitted into evidence by agreement of the parties as P. Ex. 14 and is attached as Appendix 2 to these Findings and Conclusions.

17. O'Brien testified that:

(a) In making his estimates he relied on and used the gross revenue figures as estimated by Melaniphy for the period August 1, 1987 through April 30, 1992.

(b) To cover the second quarter of 1992, he extrapolated from Melaniphy's first quarter estimate of gross revenue.

(c) O'Brien's expense categories included those that he found to be usual and necessary in the day care center business. In his opinion, based upon his actual experience with the day care centers he works with, the ratio of expenses to gross revenues ranged form a high of 83.65% in the last five months of 1987 (the only period during which he found that expenses exceeded 80% of gross revenues) to a low of 74.73% in the full year of 1990. For the entire period from August 1, 1987 through the end of 1991 O'Brien determined the ratio of expenses to gross revenues averaged 771.8% — substantially less than Melaniphy's conservative 80% figure.

(d) O'Brien's expenses figures included fixed rent of $45,000 per year for each of the years in question.

(e) O'Brien also applied the same methodology as Melaniphy to determine the net present value of estimated lost profits. As of June 30, 1992 that net present value, based on O'Brien's figures, aggregated $530,331.

18. In summary, Cohen's evidence reflects that the range of net present value of total lost profits that she would reasonably have realized from the operation of a day care center in the Property, if she had been allowed to commence operations on April 1, 1987 and would have continued through June 30, 1992, would be from $454,593 (as determined by Melaniphy) to $530,331 (as determined by O'Brien). Those figures include an annual rental expense of $45,000, pro-rated for partial years of 1987 (5 months) and 1992 (6 months), aggregating $221,250 through June 30, 1992 (a figure confirmed both by King's testimony (see Finding 7) and by the initial rent under the Montessor School lease (see Finding 8)). Because

Cohen in her capacity as owner of the Property has suffered that loss of rent, that amount (together with a similar calculation of its net present value) should be added to Melaniphy's and O'Brien's figures to determine Cohen's total lost profits and rent. That net present value amounts to $281,811.07, bringing Melaniphy's figure to $736,404 and O'Brien's to $812,142.

19. Based on a contractor's bid that she received but was unable to accept because she was deprived of the necessary financing as a result of City's having blocked her ability to operate the Property as a day care center, Cohen would have been required to expend a sum that would not have exceeded $189,000 to make the Property suitable for operation as a day care center. That amount coincides with McGrath's testimony (see Finding 6). Accordingly, Cohen's total lost profits plus rent at net present value must be offset by the sum of $102,751, which is the cost of using the sum of $189,000 for such purposes, calculated using the same interest rates as employed by Melaniphy:

		Annual	Prorated
$189,000.00	.085	$16,065.00	$6,693.75
1987			
$195,693.75	.09	$17,612.44	
1988			
$213,306.19	.115	$24,530.21	
1989			
$237,830.40	.095	$22,594.46	
1990			
$260,430.86	.085	$22,136.62	
1991			
$282,567.48	.065	$18,366.89	$9,183.45
1992			

$291,750.93 (as of June 30, 1992) less $189,000 = $102,751.

20. In final summary, Cohen's total economic damages sustained in connection with her loss of ability to operate a day care center in the Property amount to $633,653 based on Melaniphy's figures and $709,391 based on O'Brien's figures. Before other components of Cohen's damages are dealt with in these Findings, City's evidence addressed to those economic damages will be set out briefly.

21. In an effort to counter the testimony of Melaniphy and O'Brien, City offered the testimony of C.P.A. Stephen Meindl. Meindl's testimony and opinions, each of which this Court finds to be flawed and wholly unconvincing, were based on three separate income and expense projections covering the period from August 1, 1987 through December 31, 1990, each of which used a different enrollment assumption:

(a) Meindl's first projection was based upon a total enrollment of 38 children, a number reflecting the maximum enrollment that City allows for a day care center operating in a residential district under authority of a special use permit. Because that 38-child limitation is imposed by the self-same special use permit ordinance that his Court has held to be unconstitutional in the Opinion, it must be rejected out of hand. In the interest of full presentation, however, Meindl's method of calculating profit or loss for that projection will be set out briefly. He separated expenses into what he viewed as fixed and variable categories, with the beginning expense numbers being taken from O'Brien's report. "Fixed" expenses were increased by a flat 6% per year, while each "variable" expense was applied at the same ratio of gross revenue that O'Brien used. Under Meindl's 38-child enrollment model, he projected net losses of $643 in 1987, $2687 in 1988 and $4,759 in 1989, and a profit of $3,129 in 1990. That first projection is inherently flawed and bears no relation to reality.

(b) Meindl's second model assumed revenue projections based on the enrollments determined by Melaniphy for the period from August 1, 1987 through December 31, 1990. What Meindl there labeled as "fixed" expenses (advertising, depreciation, dues and subscriptions, fire alarm maintenance, rent and utilities) were taken dollar for dollar as they appear in the 1987, 1988 and 1989 federal tax returns of Unlimited, the corporation through which Cohen operates her other day care centers , while for his 1990 projections Meindl simply increased each of those 1989 "fixed" expenses by a flat 6%. What Meindl characterized as "variable" expenses were set out in his model based on Melaniphy's enrollment projections, by applying the same

percentage as those expenses bore to gross revenues shown on the Unlimited tax return for each of the years 1987, 1988 and 1989, while 1990 variable expense ratios were determined by taking an average of the ratios for 1987, 1988 and 1989. Finding 22 will address some of the principal defects in that second model prepared by Meindl.

(c) Meindl's third model assumed gross revenue projections based on enrollment figures originally anticipated by Cohen (as testified to in her deposition), but applied to those figures Melaniphy's estimated weekly rates per child. Expenses were calculated by Meindl using the same methodology as in his second model. Quite apart from the defects that the third model shares with the second (discussed in Finding 22), there is of course no justification whatever for utilizing a projection of potential business, which had necessarily been based on Cohen's estimates before the facts were known, instead of the actual facts that have since become available through Melaniphy's careful and thorough study. By definition Melaniphy's determinations, which were based on what the actual experience has been in the day care business, must be superior to before-the-fact guesswork — even informed guesswork.[2]

22. Meindl's methodology and applications in his second and third models (D. Ex. L at 8, 10), based on Melaniphy's enrollment estimates and Cohen's original anticipated enrollments, exhibited obvious errors for which Meindl had no plausible explanation and that render his calculations wholly unreliable. Importantly, Meindl made no effort to determine whether (and there is no record evidence to indicate that) the nature and scope of the Unlimited operations were comparable to the operation that could have been carried on in the Property, so as to validate expense projections that have been based on the ratios applicable to those other Unlimited operations. Fundamentally flawed (or even suspect) input necessarily generates equally flawed (or suspect) output.[3]

[2] It is scarcely necessary to point to how the projections by even the most sophisticated experts on economics and on stock market trends (to pick just two examples) have proved over the years to be viewed through a badly clouded crystal ball.

[3] In the computer trade the familiar acronym for that phenomenon is "GIGO" ("garbage in, garbage out")

And to choose just a few examples from D. Ex. L at 8 to illustrate that and other defects in Meindl's analysis:

(a) Meindl's models were purportedly based on Melaniphy's estimates of enrollment (as to Meindl's second model) and rates and income, yet Meindl's varied from Melaniphy's in certain respects without explanation.

(b) Meindl's rent figure increased $20,000 from 1987 (as annualized) to 1988, then fell off nearly $20,000 between 1988 and 1989 without explanation. By contrast, the fixed $45,000 rent figure in O'Brien's calculation tracked the initial arms-length figure negotiated with the Montessori School as well as King's expert testimony.

(c) Meindl's projections for repairs and maintenance were significantly higher than O'Brien's. Meindl acknowledged during his testimony that he had given no consideration to the fact that the Property would have been newly renovated — necessarily calling for a much lower figure for such items.

(d) Meindl's figure for utilities doubled between 1988 and 1989 without explanation.

(e) Meindl's aggregate depreciation figure was $41,000 higher than O'Brien's estimate for the period August 1, 1987 through December 31, 1990, again without plausible explanation.

(f) Insurance in Meindl's model was $31,844 higher in the aggregate than O'Brien's estimate for the same period, with no indication that the basis for the Meindl estimate was at all comparable to the Property.

(g) Office expense according to Meindl's projection was significantly higher than O'Brien's estimate for the same period, again with no explanation of the difference.

(h) Meindl's projection for telephone expenses for the years ended December 31, 1989 and December 31, 1990 contained glaring computational errors (though admittedly a small item, this is reflective of Meindl's slipshod approach to the entire matter, which belies the deceptive appearance of precision that is given by calculations made to the penny).

23. In addition to the damages that have already been dealt with

in these Findings, Cohen also incurred significant extraordinary expenses solely by reason of the extended period of vacancy of the Property brought about by City's wrongful imposition of the unconstitutional special use requirements on her.[4] Those expenses (testified to by Cohen's husband Sheldon) comprised amounts spent to board up windows or otherwise secure the Property, to clean up rotting debris and to store furniture and fixtures specifically purchased for use in the Property, and for automobile expenses for periodic security inspections of the vacant Property, summarized as follows:

Payments to carpenter for board-up and security-related work	$1,775.00
Lumber to board up windows	239.24
Vandalproofing of windows	132.41
Storage of furniture and fixtures	813.00
Automobile expense incurred in connection with security checks on the Property	1,300.00
Total	$4,259.65

24. Cohen also incurred these significant expenses (also testified to by Cohen's husband Sheldon) in connection with proceeding with the unconstitutional special use permit process:

Traffic study required as part of the special use permit proceeding	$3,430.50
Contractors' bond for work done in connection with building security and board-up	200.00
Special use permit fee paid to City	350.00
Loan commitment fee and loan application processing fee	1,900.00
Total	$5,880.50

[4] Those expenses and the expenses referred to in Finding 24 were advanced in part by Unlimited, though they were the obligations of Cohen ad owner of the Property. It was unclear from the testimony as to wether the internal accounting as between Cohen and Unlimited has reflected those advances as "due from the shareholder" or in some other appropriate manner. But this Court will award the damages to Cohen as the real party in interest, leaving it to her to reimburse Unlimited for any such advances for her benefit.

25. Cohen's testimony, which this Court finds credible and persuasive, establishes that she has suffered demonstrable emotional and mental distress as the result of City's violation of her constitutional rights. In that respect Cohen testified that she suffered extraordinary stress, and was caused to feel humiliated and degraded, in the course of the numerous hearings incident to the special permit process and attempts to obtain a building permit; that the prolonged wrongful denial of the right to use her property for the purpose intended caused such a financial strain on her and her family that she became continuously worried and depressed and developed what she described as a "sense of doom"; that she consequently experienced anxiety, nervousness and mental fatigue; that her conjugal and other relationships with her husband became severely strained; that she became irritable with her children, who avoided talking about the matter because it would cause her to react adversely; that before the special use process began she had lost about 60 pounds under medical supervision, and that she compulsively regained all the weight she had lost as a result of her worry over the entire situation.

26. As the final element of Cohen's damage sustained by reason of her having been prevented from operating a day care center business as the result of City's wrongful violation of her constitutional rights, competitors took advantage of the opportunity that she would otherwise have had to enter the marketplace and to become established in her own business. Because it is now no longer economically feasible to enter the market as a result of such increased competition, Cohen has also been deprived of the value that an ongoing business would have had if she had been permitted to establish one as she had the right to do in 1987. Melaniphy's testimony established that he is qualified to appraise the value of such a business as a going concern and that the fair market value of such a business if it had been allowed to begin in August 1987 and to operate until June 30, 1992 would be between $350,000 and $365,000. From that figure there must be deducted the principal amount that Cohen would have had to expend to put the Property into condition to carry on such an operation: $189,000.[5]

[5] Of course the actual cost of that capital investment must take into account the value of the use of money - its interest component. But because Finding 19 has already used that amount ($102,751) to reduce Cohen's recoverable damages, it would represent double counting in City's favor if this Court were to take into account once again here.

That means Cohen's net damage from this element is between $161,000 and $176,000.[6]

Conclusions of Law

1. This Court has jurisdiction of the parties. It has subject matter jurisdiction under 28 U.S.C. §§1331 and 1343 (see 42 U.S.C. §1983) and under principles of what has previously been termed pendent jurisdiction and has now become supplemental jurisdiction under 28 U.S.C. §1367.

2. Cohen had and has the necessary qualifications and experience to operate the day care center individually; as thus qualified and as owner of the Property, she had the personal right to determine that she would operate a day care center business in the Property in any commercial manner that she might choose — whether individually as a sole proprietor, or through a corporation, or otherwise. Hence all damages that have been sustained by reason of the deprivation of such right as the result of City's wrongful conduct were suffered and are recoverable by Cohen individually.[7]

3. City's imposition of the unconstitutional special use permit process deprived Cohen of the opportunity to establish and operate the day care center in the Property. Cohen is entitled to recover compensatory damages for the injuries that she sustained resulting from the deprivation of her constitutional rights in that respect.

4. To compensate Cohen fully and adequately for City's deprivation of her constitutionally protected rights, Cohen is entitled to recover the following damages:

(a) loss of the estimated profits during the period that she was deprived of operating her business by reason of City's wrongful conduct, together with loss of the estimated fair rental value of the Property, calculated as though Cohen

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[6] Because the figures set out in this Finding 26 deal only with the going concern value of the business that Cohen should have been allowed to establish, there is no need to take into account - in favor of either party - the value of the Property purely as real estate. That value, whatever it is, remains available to Cohen.

[7] This court rejects City's attempt to defeat Cohen's recovery by pointing to the fact that her other nursing home operations have been carried on through Unlimited. Cohen herself has the necessary DCFS qualification to act as director of a day care center. Nothing about her choice of Unlimited as the vehicle for her other operations make it the real party in for the contemplated operation of such a center in the Property.

had been allowed to operate the day care center during the same period;[8]

(b) loss of the use of the money referred to in Conclusion 4(a) and 4(b) during the same period;[9]

(c) loss of the opportunity to establish the day care business, measured by (i) the estimated present fair market value of the business had Cohen been able to establish it less (ii) the cost of putting the Property into condition to carry on that business;

(d) reimbursement for all expenses that Cohen incurred in attempting to obtain the special use permit;

(e) reimbursement for all expenses that Cohen incurred in connection with maintaining the Property in a vacant condition; and

(f) reasonable compensation for the mental and emotional stress, anxiety and emotional turmoil that Cohen experienced as a result of City's wrongful conduct.

Under 42 U.S.C. §1988 Cohen is also entitled to reasonable attorneys' fees and costs.

5. Cohen is not disentitled to recover damages for lost profits just because she did not in fact operate a day care center in the Property, so that such damages might be viewed as too speculative. Absolute certainty is not required in such cases, particularly where it is defendant's wrongful conduct that has blocked plaintiff's own course of conduct that would have provided greater precision (see, e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946) and other cases cited in FDIC v. W.R. Grace & Co., 877 F.2d 614, 624 (7th Cir. 1989)). In this case the fact of damage has been established. All that the law requires is that the evidence establish, with a reasonable degree of probability, a reasonable basis for the assess

[8] It is worth observing that the figure that has been determined as the fair rental value is really irrelevant, because of Cohen's ownership of the Property. If a higher figure had been selected it would increase Cohen's damages suffered in her capacity as real estate owner, but at the cost of a corresponding the converse is of course true as well. What is relevant is the damages - and in that respect her thwarted effort to lease the Property to the Montessori School compels a "yes" answer to that question. Relatedly, the credible testimony of McGarth as to the demonstrated futility of any further efforts to do so to establish a day care center in the Property (see Finding 10 as to the statements by City's officials in that respect) excused any further efforts to to do so by Cohen or on her behalf.

[9] Our court of Appeals has established that such a damage component - which essentially amounts to an award of prejudgment interest - is presumptively recoverable in every federal-question case such as this one (Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 696 (7th Cir. 1991)).

ment of damages. Here there is substantial evidence in the record that, together with the reasonable inferences to be drawn therefrom, provide more than a reasonable basis for the award of damages in Cohen's favor that this Court has determined to be appropriate.

6. Cohen would also be entitled to injunctive relief requiring City to allow here to conduct a day care center in the Property without a special use permit. However, the evidence establishes that the operation of a day care center in the Property is not now economically feasible because of the increased competition that took advantage of Cohen's absence from, and that usurped Cohen's opportunity to enter, the marketplace. That latter situation is compensable by the damages factor referred to in Finding 26 and Conclusion 4(c).

7. Cohen is entitled to recover the sum of $824,793.15 from City as damages, comprising these elements:

(a) for loss of profits plus the loss of rent for the period August 1, 1987 through June 30, 1992, each at their respective net present values (see Finding 20 and Conclusion 4(a) and 4(b)).	$633,653.00 [10]
(b) for loss of the fair market value of the day care business due to loss of opportunity (see Finding 26 and Conclusion 4(c))	161,000.00
(c) for expenses incurred in connection with attempting to obtain the special use permit (see Finding 24 and Conclusion 4(d))	5,880.50
(d) for expenses incurred in connection with maintaining the Property in a vacant condition (see Finding 23 and Conclusion 4(e))	4,259.65
(f) for severe emotional distress, anxiety and mental turmoil	20,000.00 [11]
Total	$824,793.15

[10] Both her and in the next item 7(b) this Court has chosen the more conservative damages figure - in this item7(a) by employing Melaniphy's calculation rather than O'Brien's (even though the latter could also be viewed as reasonable), and in item 7(b) by using the lower of Melaniphy's two figures.

[11] See the discussions of like awards for intangible harms suffered from violations of constitutional rights in Cygnar v. City of Chicago, 865 F.2d 827, 848 (7th Cir. 1989) and Webb v. City of Chicago, 813 F.2d 824, 836-37 (7th Cir. 1987).

It is hereby ordered that judgement shall be entered in favor of plaintiff Harriet Cohen and against defendant City of Des Plaines in the sum of $824,793.15 plus costs. This Court reserves jurisdiction to determine, at a later hearing, the amount of attorney's fees and costs to which Cohen is entitled (but such reservation of jurisdiction does not impair the finality of the judgement ordered hereby — see Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988).

_____

Milton I Shadur
Senior United States District Judge

Date: September 30, 1992

D-1

Harriet COHEN, Plaintiff,
v.
CITY OF DES PLAINES, et al., Defendants.

No. 87 C 9314.

United States District Court,
N.D. Illinois, E.D.

June 29, 1990.

MEMORANDUM OPINION
AND ORDER

SHADUR, District Judge.

Harriet Cohen ("Cohen") has sued the City of Des Plaines and numerous City officials (collectively "City") under 42 U.S.C. §1983 ("Section 1983"), claiming that City's rejection of her application for a special use permit to operate a day care center in a neighborhood otherwise zoned for single-family residential use violated her rights under the First[1] and Fourteenth Amendments to the United States Constitution. Cohen also advances a pendent claim under Art. I, § 2 of the Illinois Constitution.[2] For the reasons stated in this memorandum opinion and order, Cohen's Fed.R. Civ.P. ("Rule") 56 motion for

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[1] As always, this opinion adheres to the conventional and convenient (though technically imprecise) practice of referring to the First Amendment's underlying Bill of Rights provision (which of course imposes limitations only on the federal government) rather than to the Fourteenth Amendment (which applies to state actors and has been construed to embody such Bill of Rights guaranties).

[2] Because Illinois courts have interpreted that provision to be essentially identical to the Fourteenth Amendment standard in the respects relevant here (see, e.g., *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357, 366-69, 91, Ill.Dec. 610, 614-15, 483 N.E.2d 1245, 1249-51 (1985)), there is nothing to be gained by addressing the pendent state claim. This opinion will limit itself to the federal claims over which it has direct subject matter jurisdiction.

summary judgment as to liability is granted,[3] while City's cross-motion is of course denied.

Facts[4]

Cohen owns property at 1495 Prospect Avenue, Des Plaines (the "Property"), on which an old church stands. Under City's Zoning Ordinance of 1960 as amended (the "Ordinance"), the Property is located within a district designated "R-2" (single-family residential).

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[3] As the discussion will reflect, Cohen prevails on only two of her theories. Even *one* is enough, however.

4. Familiar Rule 56 principles impose on the movant the burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). For that purpose this Court is called on to draw all "reasonable inferences, not every conceivable inference" in the light most favorable to the nonmovant (*DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir.1987). Where as here cross-motions are involved, that principle thus demands a dual perspective that sometimes causes the denial of both motions. Fortunately, however, that has not been the result here. Just a few more words on some matters of form: Because this matter has been fully briefed on motions for summary judgment three times—once on Cohen's motion back in 1988, again on City's current motion filed December 6, 1989 and finally on Cohen's current cross-motion filed February 23, 1990—it is useful to adopt a set of shorthand symbols for the documents referred to in this opinion:

1 Memoranda in support of each side's Rule 56 motion will be designated "Mem.," memoranda in response will be designated "Ans. Mem." and memoranda in reply will be designated "R. Mem." In each instance that will be preceded by "P." for a memorandum filed by plaintiff Cohen or "D." for a memorandum of defendant City, and it will be followed by a notation in parentheses as to which of the three motions the memorandum was submitted to support or oppose, and then by a page reference. For example: "P. Mem. (Cohen I)—" refers to Cohen's memorandum in support of her first motion for summary judgment; "D. Ans. Mem. (Cohen II)—" refers to City's memorandum in response to Cohen's current motions; and "D. R. Mem. (City)—" refers to City's reply memorandum in support of City's current motion.

2 References to paragraphs in either side's current statement of material facts pursuant to this District Court's General Rules ("GR") 12(m) and 12(n) ¶—." To add a bit to the confusion, until June 6, 1990 those General Rules were designated GR 12(*l*) and 12(m) respectively.

Although that designation is primarily used for single-family dwellings, the Ordinance[5] also provides in part that property so designated may, without any special permission from City, be used for these uses among others:

> 3.1.2.2 Public schools, elementary and high or private schools having a curriculum the same as ordinary given in a public elementary or high school, colleges, junior colleges, or universities.
>
> 3.1.2.6 Churches, temples, religious reading rooms, rectories and parish houses, including nursery schools operating in any of such buildings.
>
> 3.1.2.15 Day Care homes, however no signs shall be constructed, erected or placed advertising its use, and operating hours shall be restricted to 7:00 a.m. to 7:00 p.m.

In contrast, Ordinance ¶ 3.1.2.16 allows the operation of "Day Care centers" in areas zoned R-2 only if the operator first obtains a special use permit from City and complies with the numerous size, density, signage and safety requirements of Ordinance ¶ 3.1.2.16.1 through .15.[6]

In addition to requiring compliance with the listed operating standards, the Ordinance permits City to consider community and economic needs when deciding whether to grant an application for a special use permit. Ordinance ¶ 8.1.4 says:

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[5] Even though the portions of the Ordinance excerpted by the parties and city below are listed under the heading "R—1 Single Family Residence District," the parties agree that the Ordinance treats R—1 and R—2 districts identically in all respects pertinent to this action (p. 12(m) ¶ 22; D. 12(n) ¶ 4). Districts designated R—3 and above (multi-family çresidential) and C—1 through C—4 (commercial), on the other hand, are of course subject to a more permissive zoning regime reflective of the wider range of uses that municipalities have traditionally deemed compatible with those high-density or 8 äcommercial areas. Thus although City properly voices its frequent refrain (e.g., D. R. Mem. (City) 2-3, D. Ans. Mem. (Cohen II) 10) emphasizing the differences between single- and multiple-family districts, City has suggested no similar reason to differentiate between R—1 and R—2 districts.

> No SPECIAL USES shall be granted by the City Council unless the Special Use:
> 8.1.4.1 Is deemed necessary for the public convenience at that location.
> 8.1.4.2 Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.
> 8.1.4.3 Will not cause substantial injury to the value of other property in the neighborhood in which it is located.
> 8.1.4.4. Meets that [sic] standards established in this ordinance for the particular Special Use requested.

As to special use permits allowing day care centers, Ordinance ¶ 3.1.2.16.7 specifically says:

> The Zoning Board of Appeals shall consider the density of existing day care facilities in the area. Such density shall be limited to two (2) day care centers per square mile, excluding those facilities existing in a church or temple.

Furthermore, Ordinance ¶ 3.1.2.16.15 says:

> The Plan Commission, Zoning Board and City Council may also take into consideration as a factor in reviewing the application the question of whether there is an economic need in the community for a day care center at the site proposed.

Until Cohen purchased it, the Property had been owned by the Church of God and used for religious services — in zoning parlance a "conforming use." Architecturally, the parties agree the building on the Property, although in some disrepair, still looks unmistakably like a church. Pastor Robinson of the Church of God testified before the Board of Zoning Appeals (Complaint Ex. D at 5) that child care services had not been provided in his church in the 10-12 years it had

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* Among those provisions are minimum requirements of 500 square feet of lot per child, 4 linear feet of lot frontage per child, 50 square feet of activity area within the building per child, 150 square feet of outdoor activity per child that could be expected to be outdoors at any given time and one parking space for every two staff members in excess of five, with a minimum of two spaces total. In addition the section imposes a bar on signs larger than one square foot and limits the hours of operation to 7 a.m. to 7 p.m.

occupied the Property.

Cohen had no desire to operate a church on the Property. Instead she is in the business of owning and operating day care centers[7] and would like to use the Property to open another.

To that end, on April 13, 1987[8] Cohen filed with City an application for a special use permit to operate a day care center on the Property. That application was first considered by the Des Plaines Plan Commission (the "Commission").[9] After voting two in favor and two against, on June 8 the Commission recommended to the Mayor, City Council and Zoning Board of Appeals that Cohen's application be denied. In its letter of recommendation (or, in this case, or nonrecommendation), the Commission noted community opposition to the Cohen proposal:

> Five objectors spoke mainly objecting to traffic and overabundance of day-care centers in the area. A petition in objection signed by 91 people was submitted also citing traffic and noise and too many facilities of this type nearby.

From there Cohen's application went to the Zoning Board of Appeals[10], which held a public hearing on the matter on June 9. Cohen's architect Dan McGrath ("McGrath") testified that Cohen, in order to come into compliance with the Ordinance's playlot area per child restriction, had reduced the number of children proposed to be accommodated to 38 from the 86 that had initially been proposed to the Plan Commission. Still, McGrath expressed his belief that Cohen's proposal would require a relaxation of the Ordinance provisions in at least two respects:

1. Cohen proposed operations beginning at 6:30 a.m. (it will be remembered that the Ordinance provided for operations only after 7 a.m.).
2. McGrath said two other day care facilities were currently

[7] Cohen operates two other day care centers, one in Des Plaines (Sunshine Day-Care Center #1) and another in Arlington Heights, Illinois.

[8] All further references to dates without any year designation also refer to 1987.

[9] That body comprised individual defendants Herman DiVito, Daniel F. Fletcher, Hale Elsen and Irving Rateike.

[10] That body comprised individual defendants A. William Seegers, Earle Stover, Jerome Zanca, Tom Schiro, Gerald Meyer and James Szabo.

> in operation within a one-mile radius of the Property, despite Ordinance ¶3.1.2.16.7's limit of two day care centers per square mile.[11]

At the June 9 hearing about 16 people raised their hands to indicate they objected to Cohen's plan, and five local residents spoke of their specific objections. In addition, a petition was presented to the Board bearing the signatures of 154 people opposed to Cohen's proposal. Of those who spoke, some expressed fears that the proposed day care center would cause traffic problems and strain the neighborhood's supply of on-street parking. Others said there were already too many day care centers nearby and there was no need for more. Still others worried that Cohen would be unable to turn a profit with only 38 children—particularly in light of the great expense that would be required to renovate the dilapidated church and comply with stringent state health and safety regulations—and that she might be tempted in the future to exceed the Ordinance's limit to make ends meet (knowing that City has historically done little investigation or enforcement of its regulations). Finally, several said they believed such a commercial use was generally unsuited for a residential neighborhood and might adversely affect property values. After that public comment, the Board voted 6 to 0 to recommend that the Mayor and City Council deny Cohen's request for a special use permit.

On August 24 the City Council's Municipal Development Committee also considered Cohen's special use application and recommended that it be denied by the full Council. In its Report the Committee said:

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[11] McGrath's statements before the Board are not included her as evidence that Cohen in fact failed to meet the Ordinance requirements. Indeed, those statements are too imprecise to be the basis for concluding that Cohen's proposal is at odds with the Ordinance. First, although McGrath spoke of two other facilities within a one-mile *radius*, the Ordinance looks to a one-square-mile *area* as defined by a circle "whose radious [sic] shall be 2,975 feet." Given McGrath's statement before the Board (as taken down in the hearing minutes) that "they are basically on the border," it is entirely possible that Cohen's proposal actually complies with that requirement. Second, McGrath did not specify whether either of the other facilities was in a church or temple, in which case Ordinance ¶ 3.1.2.16.7 would exclude it from consideration when calculating day care density. McGrath's statements are included here solely to reflect kinds of issues raised at the hearing before the board.

> The members did not feel that this was a good location because all around the property in question is residential use.

Cohen's application first reached the Mayor and City Council in full session on September 8, but the matter was again referred to committee. Finally, on September 21 the Mayor and City Council voted on Cohen's application and denied it unanimously.[12]

Thus far the facts are uncontested. But the parties are at odds as to how the Ordinance and City's prior record on approval of applications for special use permits has affected the distribution of child care facilities in Des Plaines. Cohen lists seven day facilities that she claims operate in religiously-affiliated buildings in areas zoned for residential use.[13] Four of them are located in R—2 single-family districts, one is in an R—4 multiple-family district and two are in R—5 multiple-family districts. According to Cohen, each of those facilities charges a fee for the services it provides, advertises in the local yellow pages[14]

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[12] And that rounds out the case of characters in the role of defendants. Due to that denial, Cohen joined as additional defendants Mayor and City Council Members Mary C. Childers, Robert F. Muehlenbeck, Joseph P. Bonk, Thomas J. Christiansen, James D. Healy, Margaret Wetter, Daniel Kisslinger, William Schneck, Wayne A. Adams, Joseph Hardiman, Bruce Gebert, Carmen J. Sarlo, Vince Addante, Nick Chiropolos, Carl P. Haupt and Charles F. Hervas.

[13] There seems to be some confusion as to exactly how many child care facilities Des Plaines has—Cohen talks of six in her briefs but lists seven in her 12(m) Statement, basing the later Statement on several much longer compilations (one obtained from City during discovery and one obtained under the Freedom of Information Act) that include residential and non-residential areas alike. Because the parties argue from the list of seven in Cohen's 12(m) Statement, and because neither party challenges the validity of that list, this opinion takes that list as the operative one.

[14] In addition to its more general objection to Cohen's presentation of that information in her Statement of Additional Facts (see n. 15), City specifically "makes no response" to Cohen's statement (based on her sworn affidavit) that the seven facilities at issue were listed in the yellow pages under the heading "Day Nurseries, Nursery Schools and kindergartens." Instead City objects on relevance and hearsay grounds. City is clearly wrong on both counts. Although the fact that the yellow pages list the facilities as "nursery schools" is irrelevant to how the Ordinance would classify those facilities, it certainly is relevant to Cohen's claim that those facilities are essentially commercial ventures even though located on church property. In addition, the listing is not offered for the truth of the matter asserted—the fact that they are day nurseries, nursery schools or kindergartens—but rather for the fact that they advertise their services to the public.

and operates with a license from the state as a "day care center". Cohen further says that at least one, Kiddie Junction Day Care I, is commercially operated by a "for profit corporation" and that none of the seven was required to obtain a special use permit.[13]

City's dispute on that score is basically semantic. While City does not challenge Cohen's assertion that all those facilities operate in the zoning districts Cohen describes, it insists that none is a "day care center" under Ordinance ¶1.2.17:

> A specifically designed, reconstructed or remodeled structure other than a single-family residence simultaneously occupied by a single family, and licensed by the State of Illinois, providing day care services for compensation for more than

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[13] City urges on the basis of *McLaughlin v. Copeland*, 435 F.Supp. 513 (D.Md.1977) that this Court should disregard basically all of the factual assertions related in the previous paragraph of the text—including all evidence of the facilities that Cohen claims provide day care services in residential areas without need for a special use permit by virtue of their church location. City reads *McLaughlin* as barring Cohen from filing her Statement of Additional Facts Requiring the Denial of Defendants' Motion for Summary Judgment. But *McLaughlin, id.* at 519, in dealing with allegations in a so-called Appendix to plaintiff's memorandum in opposition to defendants' motion to dismiss, refused to treat those allegations as evidence only because that Appendix was not in the form of an affidavit provided for in Rule 56. In contrast, Cohen's Statement of Additional Facts is fully supported by affidavits in proper Rule 56(e) form and is specifically *required* by GR 12(n) in conjunction with her concise response to City's 12(m) Statement. City has also relied on its suggestion that the Statement of Additional Facts be stricken in its entirety, instead of responding to the individual factual allegations contained in the document as GR 12(n) requires. Even when Cohen retendered some of the same statements of facts a s part of her own 12(m) Statement (P. 12(m) ¶ ¶ 20, 23-28). City again failed to respond properly. City's blanket response that those statements are "either admitted by these defendants or conceded by them to be adoptions of statements they filed previously, as to which these defendants make no further response" is really no response at all, because City also failed to respond when Cohen first tendered those statements of fact other than to object to Cohen's filing on *McLaughlin* ground.s Because that case is wholly inapposite, this Court must not only consider those facts as tendered by Cohen but must also deem City's failure to respond specifically to each purported fact as an admission pursuant to GR 12(n).

either (8) children during the day.[16]

City instead calls those facilities operating on church property without special use permits "nursery schools"—a designation that would make each of those facilities a conforming use under the Ordinance ¶3.1.2.6 provision allowing "Churches, temples, religious reading rooms, rectories and parish houses, including nursery schools operated in any of such buildings." In that way City is able to acknowledge the existence of child care providers in church buildings while still insisting (D. 12(m) ¶17):

> No day care centers are presently operated by any religiously affiliated person, group or entity in any residential areas within the City of Des Plaines.

Cohen understandably suggests that City is trying to have its cake and eat it too.[17]

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[16] [Footnote by this Court] That definition may be contrasted with the definition of "day care home" (Ordinance ¶ 1.2.16):

> A single family residence, simultaneously occupied by a single-family and licensed by the State of Illinois, providing day care services for compensation for not more than eight (8) children during the day to include the family's natural or adopted children under age 18. Apartments, condominiums, townhouses, rowhouses and similar residential units are specifically excluded.

No one has suggested that Cohen's facility, or any of the others listed, would qualify as a "day care home."

[17] Indeed, Cohen has moved to strike City's 12(m) ¶¶ 16 and 17 as not supported by the affidavit City offers in support. That affidavit states that no day care centers operate in residential areas pursuant to special use permits, not that no day care centers operate in residential areas in any event. While City's proffered statement of fact leaves unanswered the question Cohen wants answered—whether the nursery schools whose operation City acknowledges are in any substantive sense distinguishable from facilities labeled "day care centers" under the Ordinance—it is not so contrary to the affidavit that it should be stricken. In fact, when read in light of City's circular definition of "nursery school" discussed below in the text—a nursery school is a day care provider that requires no special use permit to operate in a church—that statement of fact flows logically from the affidavit. However, such a reading renders those paragraphs entirely beside the point. When the issue is whether City's decision not to require permits of nursery schools in church buildings is rational, it could hardly be less relevant that following that decision none of the nursery schools located in church buildings and operating in residential neighborhoods obtained permits. Thus there is no need to strike the two paragraphs, but allowing them to stand does not create any genuine issue of material fact at issue.

Nowhere in the Ordinance is the term "nursery school" defined, and City seems hard pressed to come up with a single definition that captures the Ordinance's intent.[18] It makes this effort at D.R.Mem. (City) 6:

> The Des Plaines ordinance defines adjunct "nursery school" activities simply by permitting these activities in connection with the permitted use of property as a church or for school purposes.

For anyone to whom that purported "definition" seems inordinately opaque—and this Court includes itself in that category—City's meaning becomes clearer when it says (D.R.Mem. (City) 11):

> [T]his same plaintiff could operate a nursery school in the building she now owns were it in conjunction with an otherwise permitted use under the ordinance, such as a church operation.[19]

Apparently there is no material difference between the *activities* engaged in by nursery schools and day care centers. Instead, a provider of day care services attains the status of a "nursery school" simply by operating on property otherwise used for religious purposes, but it is considered a "day care center" if it operates as a stand-alone facilities with no other permitted use under the Ordinance.[20]

Accordingly, in spite of all the smoke City raises with its accusations that Cohen's arguments amount to verbal "game playing"

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[18] Cohen cites Ill.Rev.Stat. ch. 23, § 2212.12, which before its repeal in 1982 (leaving no state definition of "nursery school") provided:

> "Nursery Schools" means day care centers which receive children between the ages of 2 and 6 years and which are established and professionally operated primarily for educational purposes to meet the developmental needs of the children served.

City, however, denies that the now-repealed state-law definition ever had any bearing on the Ordinance's use of th term "nursery school."

[19] [Footnote by this Court] Even a glance at the Ordinance itself demonstrates that those two statements are not precisely correct in their implication that the Ordinance would allow a nursery school as an adjunct of any type of permitted use. Although the Ordinance allows nursery schools in churches or other religious buildings, it does *not* allow nursery schools as adjuncts to any other use permitted in an R—2 district. Not only çof those other uses—whether elementary or high schools, libraries, county clubs or hospitals—permits an additional use as a nursery school.

(D.R.Mem. (City) 6), City has failed to point to a fire. Even though this case has been stewing for 2 1/2 years since Cohen's initial summary judgment motion cause the parties to begin formulating and briefing their positions, City has failed to identify any material difference between the manner in which the facilities in church buildings that City calls "nursery schools" provide child care services for a fee and the manner in which a "day care center"such as Cohen's would provide those same services.[21] As a result, it is undisputed of record

[20] That understanding of the Ordinance is supported by the 1977 amendment that put the Ordinance in its present form. Before that amendment, Ordinance ¶ 3A.2.6 (corresponding to current ¶ 3.1.2.6) allowed as conforming uses in single family residential districts (emphasis added):

> Churches, temples, religious read rooms, rectories, and parish houses, including nursery school YYor day care centersYY (non-boarding) operated in any of such buildings.

City Ordinance ¶-5-77 amended that paragraph by striking the language "or day care centers (non-boarding)." In doing so City claims it intended to prevent anyone, including a church, from operating a stand-alone day care center on property not used concurrently for religious services (see n. 22).

[21] P. 12(m) ¶ 19 reads:

> The City of Des Plaines cannot identify any expert, non-expert, study, report, expert report, statement or other source of evidence that will support a contention that there is a substantive difference between the nature of a day care center operated in a religiously affiliated property and a non-religiously affiliated day care center for which a special use permit must be obtained under the Zoning Ordinance.

In reaching that conclusion, Cohen cites to City's answer to Interrogatory 6(a), in which Cohen asked City to identify any differences between a day care center and a nursery school. City answered:

> The differences related to the permitted use provisions of the zoning Ordinance and not to the essential "nature" of day care center activities. The operation of a day care center in a non-religiously affiliated facility is difference from that "nursery school" activity permitted under the Zoning Ordinance, since the commercial nature of the non-religious day care center is incompatible with the residential nature of the area or areas zoned for residential purposes. Defendants state that at this time it relies on no identifiable expert, non-expert, study, report, expert report or statement in making its answer to Interrogatory No. 6(a) .

Although P. 12(m) ¶ is a fair paraphrase of that answer by City the latter has failed to admit or deny that statement of fact. Instead City claims Cohen's assertion is "not a factual statement but... an argument with respect to the status of the record in this case" and therefore requires no response in City's 12(n) Statement. That is incorrect. Even a bald conclusion of law may become a statement of fact for GR 12(m)

that City allows four facilities to provide child care services in R—2 districts[22] (and three others to provide those services in multi-family residential districts) without special use permits, but it has allowed none to operate in R—2 districts pursuant to a special use permit.

Equal Protection

Count 1 of Cohen's Complaint claims City violated her right to equal protection under the Fourteenth Amendment and under Ill. Const. Art. I, § 2 by placing her on the short end of three "unreason

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purposes if it is admitted by both parties. Because City has failed to indicate how Cohen's statement fails adequately to reflect the "status of the record in this case," that statement is deemed admitted pursuant to GR 12(n). Moreover, by arguing that the Ordinance does not benefit religion, City effectively concedes (D. Ans. Mem. (Cohen I) 20) that the church-located nursery schools do not engage in any religious education that might distinguish their programs from any other day care facility.

[22] City's final attempt to distinguish those four from Cohen's proposed center is unavailing. As to three of those, D. Ans. Mem. (Cohen II) 10 insists that they were conforming uses because adjuncts to school facilities. First, City points to nothing in the record to support that assertion—nor can this Court find any support for it either. On the contrary, only one—Oakton Community College Child Development—appears to have any relationship to a school. Neither Cohen's statement of facts nor City's discovery letter, on which Cohen's list is based, mentions any school affiliation for the other two—Northwest Suburban Toddler Center and Trinity Lutheran preschool and Day Care. Those latter two are both church-affiliated, and all the evidence suggests they must have come under the church exclusion. Second, as this opinion has said in n. 19, the Ordinance does not appear to provide the kind of general exclusion for school-affiliated child care centers that church-affiliated facilities enjoy. City's assertions to the contrary, absent a citation to any Ordinance provision to that effect, are unpersuasive. As to the fourth—Kiddie Junction Day Care I—City claims that for-profit facility operates only as a permitted non-conforming use pursuant to a "grandfather" provision (Ordinance ¶¶ 11.1.1, 11.2.1, 11.4.1, 11.4.3). Cohen has not challenged City's claims 91) that Kiddie Junction has operated without a permit since before the Ordinance was amended in 1977 or (2) that the amendment was specifically intended to prevent anyone else from doing what Kiddie Junction had done (and Cohen now seeks to do): take over a day care center operating in an old church after the church itself left the premises. To close that perceived loophole, City amended the Ordinance to allow without permits only "nursery schools" as adjuncts to permitted church uses.

able and arbitrary" distinctions:

1.-by allowing schools to locate in R—2 zoned districts without a permit, while required a special use permit of those seeking to operate day care centers;

2.-by allowing day care centers to locate in commercial districts without a permit or any City regulation of enrollment or facilities, while required a permit of, and regulating heavily, day care centers in single-family residential districts; and

3.-by allowing "nursery schools" to provide day care services in church buildings in single-family residential areas without a permit or regulation, while requiring non-church-affiliated day care centers to apply for a permit and to submit to City regulation.

Cohen challenges the Ordinance both on its face and as applied.

This Court's role in disputes over zoning classifications is narrowly circumscribed. Federal courts consistently emphasize that they do not sit as superior boards of zoning review (see, e.g., *Harding v. County of Door,* 870 F.2d 430, 432 (7th Cir.1989)). Review by this Court is appropriate only if a zoning ordinance or a decision made under its authority violates an applicant's constitutional rights.

[1] Cohen's first equal protection claim—that City discriminates irrationally against day care centers by allowing schools but not such centers as acceptable R—2 classification uses—is so weak that she has not continued either to advance it in her motion for partial summary judgment or to defend against that aspect of City's summary judgment motion. Whatever arguments Cohen might have been able to muster to show that a day care center should be treated for zoning purposes no differently from a school, she has not even put herself into a position where she can assert them. Fundamental to equal protection law are the dual concepts that "all persons similarly circumstanced shall be treated alike" (*F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989 (1920)) but that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" (*Tigner v. Texas,* 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)).

Cohen has failed to present any evidence whatever that she, as an individual desiring to operate a commercial day care center, is any way "similarly circumstanced" to a public or private elementary or high school, college, junior college or university when it comes to

how her property use should be treated for zoning purposes.[23] City's motion for summary judgment is therefore granted as to Cohen's claim that the Ordinance's distinction between schools and day care centers violates the Equal Protection Clause, and Cohen's cross-motion on that claim is denied.

[2] Precisely the same is true of Cohen's claim that the Ordinance robs her of equal protection of the laws by permitting day care centers to operate in commercial districts without special use permits and without any of the other restrictions imposed by Ordinance ¶3.1.2.16. Cohen might have a colorable argument if the purpose of the Ordinance were to regulate the health and safety conditions within day care centers generally. Rather, as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392-93, 47 S.Ct. 114, 120, 71 L.Ed 303 (1926) (quoting *City of Aurora v. Burns*, 319 Ill. 84, 94, 149 N.E. 784, 788 (1925)) recognized long ago, land use regulations such as the Ordinance are designed primarily to protect the community at large, not the children who may occupy a particular day care center:

> The segregation of industries commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation,and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations.

Thus, such provisions may distinguish between day care facilities situated in different zoning areas without violating Cohen's right to equal protection, for by definition she and a person who wants to operate a day care center in a commercial district would not normally by "similarly situated" with respect to questions of land use.

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[23] In fact, Cohen has not even responded to City's claim (D.Mem. (City) 13-14) that it exempted schools because any attempt to regulate them would have been trumped by the state's primary right to establish and regulate an educational system and to condemn property on which to build its schools (City *Board of Education, School District 33, DuPage County v. City of West Chicago*, 55 Ill.App.2d 401, 205 N.E.2d 63 (2d Dist.1965)). If true, City's inability to require a permit of such schools would itself indicate that Cohen and those schools 3were not similarly situated.

In any case, again Cohen has failed to present any evidence that would suggest she should be viewed as situated similarly to the operator of a day care center in a commercial zoning district. Accordingly, City's motion for summary judgment as to that aspect of Cohen's Complaint is also granted, and Cohen's Complaint is also granted, and Cohen's cross-motion on that aspect too is denied.

[3] Cohen's memoranda most vigorously pursue the third prong of her equal protection claim: that City violated her right to equal protection by forcing her to jump through more regulatory hoops than it would have required has she been a church conducting religious services on the Property. And she knocks that potential third strike out of the constitutional ballpark.

It is well established that City's zoning ordinance should be upheld so long as (1) it is "rationally related to a legitimate publish interest" and (2) it does not (a) classify on the basis of race, gender, alienage or national origin or (b) impinge on a fundamental personal right (*City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). Because this case involves none of the issues that would call for heightened scrutiny, the sole question is whether City's decision to require permits of day care centers located in single-family residential areas while at the same time granting carte blanche to facilities that provide precisely the same services in the same neighborhoods—and doing so simply because those facilities are located in buildings that are also used for religious purposes—was rational.

This Court finds that City's decision clearly was not a rational one. In spite of the age of this case, City has utterly failed to proffer any convincing reason for the distinction made by the Ordinance. In its response to Cohen's first motion for summary judgment back in February 1988, City explained the exclusion or regulation of "commercial" day care centers (D. Ans. Mem. (Cohen I) 10):

> If the intensity of a day care center is not restricted, the commercial nature of an unrestricted use will then encroach upon the enjoyment of the single family residential area and have a detrimental effect upon the values of the single family homes.

City's only reason for excluding churches from regulation can fair ly be inferred from its description of the exclusion itself, which D. Ans. Mem (Cohen I) 8 (emphasis added) says is available to:

> Nursery schools, if operated in a church, temple, religious reading room, rectory or parish house building, *whereby the*

character of the property is not changed or altered in such a manner as to have a detrimental effect on the neighboring single family homes.

City thus indulges a conclusive presumption that child care facilities located in church buildings will be operated in a sufficiently noncommercial manner so as not to work a detrimental alteration of the surrounding single family neighborhood, for City does not even subject those facilities to any regulation.

City has not even argues, nor do the minutes of any of the City Council meetings at which the 1977 amendments were discussed suggest, that the Ordinance drafters had ever discussed the issue to what effect church-affiliated nursery school businesses[24] would have on surrounding neighborhoods. City has not pointed any studies or research it has done—whether at the time of adoption or amendment of the Ordinance, or even in preparation for this case—to determine whether a church-affiliated child care facility would be more or less likely than one not so affiliated to be sensitive to the problems of "intrusion of business with its increased traffic, noise, an depreciation of home values" (D. Ans. Mem (Cohen I) 14) that the Ordinance assertedly seeks to protect.

And that is not the end of the matter: City has given no reason even to think that any such evidence would exist. Even though it is settled that "statutory classifications will be set aside only if no grounds can be conceived to justify them" and a legislature may legislate "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" (*McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1409, 22 L.Ed.2d 739 (1969) (internal quotes omitted)), City must present at least *some* evidence that it could rationally have concluded that church-affiliated child care facilities would have less of a detrimental impact on a residential neighborhood than any other day care center. But quite to the contrary, it is undisputed that all those church-affiliated child care facilities that do operate in R—2 districts without special use permits charge a fee and advertise their services. One, according to Cohen's undisputed 12(m) ¶ 20, has an enrollment of 120 chil-

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[24] And businesses they are, notwithstanding their nonprofit status. One need only look at the operations of Hughes Aircraft before its purchase by General Motors to realize that the incentive to operate a business as a business exists even when undertaken for the benefit of a not-for-profit foundation.

dren even though its Illinois day care center license provides for only 75. Nothing suggests that such facilities, merely because they are housed in buildings that are used for church purposes at *some* times, will at *other* times engage in their "commercial" activities with any less vigor than would any facility lacking an alternate religious use. Absent any rational reason for distinguishing between nursery schools in church buildings and a functionally equivalent day care center, the remainder of City's arguments become irrelevant. City tries to argue that the 1977 amendments were specifically intended to eliminate any discrepancies between the treatment of churches and others. But while City cites to hearings held respecting the 1977 amendments, those hearings addressed *only* City's reasons for requiring permits of all child care facilities that met the Ordinance definition of "day care center," not City's reasons for retaining the language that permitted undefined "nursery schools."[25]

In fact, the minutes of that hearing do not even support the notion that City intended at that time to maintain a distinction between nursery schools and day care centers. When City Attorney Charles Hug spelled out in those proceedings precisely how the amendment would affect the Ordinance language, he said it would delete the words "including nursery schools and Day Care Centers operated within such building." Had City in fact deleted the nursery schools as well as day care centers, this case would presumably not have arisen—because in that even *all* child care facilities in single family residential districts would have been treated equally. Instead, regardless of what City may perhaps have *intended* in 1977, when the amendments left the term "nursery schools" in the Ordinance they preserved the facial distinction for which City has been unable to give any functional meaning—thus leading, in practice, to differential treatment of Cohen.

City finally contends that it may distinguish between nursery schools and day care centers even if no functional distinction exists between the two facilities. For that novel proposition City cites *Pre-School Owners Association of Illinois, Inc. v. Department of Children*

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[25] All the statements that pointed in that direction were made by Robert Burns in objection to the amendments. He urged City not to restrict churches' ability to operate day care centers in any way, but only because churches had the facilities to accommodate child care programs that typically went unused when not used for services or Sunday school.

and Family Services, 119 Ill.2d 268, 116 Ill.Dec. 197, 518 NE.2d 1018 (1988), which rejected equal protection and First Amendment challenges to Ill. Rev. Stat. ch. 23, ¶2212.09. In part that statute grants an exemption from Illinois Department of Children and Family Services regulation for facilities that would otherwise qualify as day care centers if they are (emphasis added):

> (e) facilities operated in connection with a shopping center or service, religious services, or other similar facility, where transient children are cared for *temporarily while parents or custodians of the children are occupied on the premises and readily available;* BB or
>
> (i) programs or that portion of a program which (1) services children who shall have attained the age of 3 years, (2) is operated by churches or religious institutions as described in Section 501(c)(3) of the federal Internal Revenue Code, (3) receives no governmental aid, (4) is *operated as a component of a religious nonprofit elementary school*, (5) operates primarily *to provide religious education*, and (6) meets appropriate State or local Health and fire safety standards.

But as the above-emphasized portions of that statue show, any case based on such narrowly-drawn exceptions really cuts the other way. As to the validity of Section 2212.09(e), *Pre-School Owners*, 119 Ill.2d at 276, 116 Ill.Dec. at 201, 518 N.E.2d at 1022 said:

> It was well within the legislature's province to determine that programs servicing a transient population or providing short-term or temporary care, by their very nature, did not pose the problems that prompted the decision to regulate the subject in the first place.

And as to Section 2212.09(i), the opinion there (*id.* at 277, 116 Ill.Dec. at 202, 518 N.E.2d at 1023) upheld what it viewed as a rational decision to allow state education authorities to regulate all *school-affiliated* day care centers. Here City has not even suggested that is nursery school/day dare center dichotomy rests on a rationale similar to the short-term/long-term or educational/noneducational distinctions that *Pre-School Owners* found legitimate.

On that score the current case is far more like *Milwaukee Montessori School v. Percy*, 473 F.Supp. 1358 (E.D.Wis.1979), which struck down a Wisconsin statute that exempted from regulation day care centers operated by pubic or parochial schools but failed to exempt private nonsectarian schools. That decision found there was

no rational basis for the state's failing to treat sectarian and nonsectarian schools alike when it decided to regulate the operation of day care centers generally.

City has similarly failed to raise any genuine factual issue that might provide a rational reason for distinguishing child care providers on the sole basis of whether they occupy a building that is also used (though not necessarily at the same times) for church purposes. consequently Cohen has established her entitlement (and City's lack of entitlement) to summary judgment.

Substantive Due Process

Although the preceding discussion suffices to establish City's violation of Cohen's constitutional rights, a brief word is in order regarding Cohen's other claims. Count II charges City with violating Cohen's substantive due process rights by making the same three unreasonable distinctions that have been discussed in the preceding section of this opinion.[26] Of course her due process claims predicated on the first two distinctions must fail for the same reasons as her corresponding equal protection claims. But there is an even more fundamental reason that dooms *all* her due process arguments.

[4] Before Cohen may establish a violation of her due process rights she must first show that she has been deprived of a constitutionally protected property or liberty interest (*Bigby v. City of Chicago*, 766 F.2d 1053, 1056 (7th Cir.1985)). Only after she has made such a showing in this Court required to decide whether that deprivation by City was rational. Cohen has failed to meet that threshold.

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[26] D. Mem. (City) 12-134 addresses the issue whether the denial of Cohen's application deprived her of procedural due process. Those arguments appear to have been made in an overabundance of caution, out of fear that this Court would read the Complaint's blanket due process claims to include a procedural component. On this Court's reading of the complaint as amended, however, no such component was ever included—and Cohen's failure since then to rebut City's arguments lends support to that reading. All the same, even if Cohen had pressed such a claim it would fail on the facts. Cohen was afforded five hearings and ample opportunities to present her case, and one of Cohen's allegations even hint at any procedural irregularities. True enough, those hearings did not have all the trappings of judicial procedure, but it bears remembering that zoning decision are inherently legislative and thus need not implicate all those procedures. In short, Cohen received all the process she was due.

[5] Cohen has certainly not been deprived of the Property, nor has City taken away any pre-existing license as the Property. Although Cohen claims to have been deprived of the use of her Property in the manner of her choice—as a day care center—her mere desire or expectation to use the Property in t thatmanner falls short of a constitutionally protected property interest. Under *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Cohen claims to be entitled to a special use permit because she has met all the requirements set by the Ordinance. But thatis a question of fact that City has not conceded. Furthermore, even if Cohen were found to have met all the objective criteria set by the Ordinance (e.g., square footage per child, parking spaces per employee), the Ordinance allows consideration of economic, aesthetic and community effects not easily susceptible to objective determination. By establishing discretion in the zoning authorities and City Council to make such determinations, the Ordinance clearly creates no claim to entitlement in any permit applicant, including Cohen. As our Court of Appeals has this month reiterated in the context of liquor license denials (*Bayview-Lofberg's, Inc. v. City of Milwaukee*, 905 F.2d 142, 145 (7th Cir.1990), quoting *Scott v. Village of Kewaskum* 786 F.2d 338 (7th Cir. 1986) after repeating the above quotation from *Board of Regents v. Roth*):

> To the extent a request appeals to discretion rather than rules, there is not property.Absent a property interest. Cohen's substantive due process claim must fail.

Establishment Clause

[6]WWCohen's final claim is that the Ordinance violates the first two prongs of the tripartite test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1981) for determining whether a state action violates the Establishment Clause.[22] Cohen claims the pri

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[22] Despite a great deal of rhetoric expended in the supreme Court's numerous efforts to pick out a line of decision in church-state jurisprudence over the past decade, the *Lemon* criteria remain the operative standard—see most recently *Board of Education of the Westside Community Schools v. Mergens*,——U.S.——, 110 S. Ct. 2356, 2364, 110 L.Ed.2d 191 (1990).

mary purpose and effect of the Ordinance is to advance religions.

As to the purpose of the Ordinance, City cites numerous comments at the City Council hearings on adoption of the 1977 amendments that the Council's intent was not to benefit religion, but rather to put churches on an equal footing with other day care operators. Whether or not that was the Council's true intent, as this opinion has remarked, their failure to eliminate or meaningfully to limit the "nursery school" exemption has thwarted any intent to that effect by allowing churches to operate commercial child care facilities in a manner and location foreclosed to all others. P.R.Mem (Cohen I) 12 describes the effect of this situation:

> A religious facility is able to enroll many more children in a much smaller facility than its nonreligious counterpart. these benefits not only increase the religious facility's ability to generate revenues, but also reduce its costs of operation, particularly the cost of maintaining a larger facility. These factors, when added to the already substantial advantage of not being required to pay taxes on either the land or the income of the day care operation, significantly benefit the facility.

Making such a benefit available only to churches is precisely the kind of subsidy that a majority of Justices found violated the Establishment Clause in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), quoting *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 348, 107 S.Ct. 2862, 2874, 97 L.Ed.2d 273 (1987) (O'Connor, J., concurring):

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion BB it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

City's arguments that the Ordinance confers no benefit on churches operating child care facilities on their premises are wholly unconvincing.

Finally, this case is readily distinguishable from *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir.198), which upheld a Virginia exemption from state day care center licensing requirements for religiously affiliated centers. that

exemption was promulgated specifically to accommodate religious facilities that considered their child care operations an integral part of their religious education functions. In contrast, City's exemption applies to all day care centers in church buildings regardless of whether they teach religion at all. Furthermore, there is not evidence that any of the facilities operating pursuant to City's exemption view their child care functions as pastoral.

Here the sole effect of City's Ordinance is to lift from religious organizations, without any rational justification, a regulatory burden that is uniformly applicable to day care operators generally. Hence the Ordinance violates the Establishment Clause.

Conclusion

There is not genuine issue of material fact. City's Ordinance violates the Equal Protection and Establishment Clauses of the Constitution by exempting other child care providers from regulatory and permit obligations on the sole basis that they operate in buildings used for church purposes. Cohen is accordingly entitled to a judgment as a matter of law on her claim. Because that establishes liability on City's part, leaving Cohen's damages to be ascertained, this action is set for a status hearing at 9 a.m. July 11, 1990 to discuss the necessary further proceedings to resolve this litigation fully.[28]

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[28] After the first round of briefing on Cohen's initial motion for summary judgment has been completed, Cohen filed her "Supplement to Complaint" in which she charges City with unreasonably interfering with her attempt to mitigate damages by leasing the Property to a Montessori School. Cohen claims that City unreasonably delayed review of her application for a building permit to make needed modifications and additionally conditioned approval of her application upon her meeting numerous requirements unrelated to any legitimate building code concern. City has sought summary judgment on those claims, though Cohen has not. But City's entire discussion of those supplemental claims amounts to a one-paragraph assertion (d. Motion ¶ 5) that Cohen never met the requirements of City's building code, plus two

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No. 93-1756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HARRIET COHEN,

Petitioner,

v.

CITY OF DES PLAINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether prohibiting a commercial day care center in a single-family zoning district violates the Establishment Clause or Equal Protection where a day care center is a permitted use in a church or a private or public school.

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STATUTES
(not set forth by Petitioner)

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105 ILCS 5/10-22.18 (School district powers)

5/10-22.18a. Child care and training centers—Charges—Public aid payments for certain children

§10-22.18a. Child care and training centers—Charges—Public aid payments for certain children. To establish Child Care and Training Centers for children under the age of compulsory school attendance for the purpose of providing them (1) social and educational guidance and developmental aids supplemental to parental care and training designed to assist them in attaining their greatest potential during their school years and adult life and (2) care and services, in addition to the services specified in (1), required because of the absence from home for all or part of the day of their parents or other persons in charge of their care as a result of employment or other reason. The board may also make the facilities of the Centers available before and after as well as during regular school hours to school age and preschool age children who may benefit thereby, including children who require care and supervision pending the return of their parents or other persons in charge of their care from employment or other activity requiring absence from the home.

105 ILCS 5/10-23.2 (School district powers)

5/10-23.2. Nursery schools

§10-23.2. Nursery schools. In all districts maintaining grades 1 to 8 or 1 to 12, to establish nursery schools for the instruction of children between the ages of 2 and 6 years, if, in its judgment public interest requires them and sufficient funds obtained from local and federal sources other than local district taxes are available to pay the necessary expenses thereof; provided, that the school board shall at all times have complete jurisdiction and control

over such schools, including the employment of teachers, attendants and any other employees, and shall have complete control of the expenditure of such funds in connection with the establishment and maintenance of such schools.

225 ILCS 10/2.09 (Licensing provision)

10/2.09. Day care center

§2.09. "Day care center" means any child care facility which regularly provides day care for less than 24 hours per day for (1) more than 8 children in a family home, or (2) more than 3 children in a facility other than a family home. The term does not include (a) programs operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years.

ZONING ORDINANCES

(Definitions)

1.2.17 *DAY CARE CENTER*: A specifically designed, reconstructed or remodeled structure other than a single-family residence simultaneously occupied by a single family, and licensed by the State of Illinois, providing day care services for compensation for more than eight (8) children during the day. (Amended May 20, 1974—Z-6-74.)

3.1.2 *USE REGULATIONS*: A building or premises shall be used only for the following purposes:

3.1.2.2 Public schools, elementary and high or private schools having a curriculum the same as ordinarily given in a public elementary or high school, and having no rooms regularly used for housing or sleeping purposes; colleges, junior colleges, or universities.

* * *

STATEMENT OF THE CASE

Petitioner's statement of the case contains the following misstatements:

1. Petitioner states:

> Thus, the Des Plaines zoning regime allows an unlimited number of day care centers located in churches or other religious facilities to operate without a special use permit. All others seeking to open day care centers outside religious facilities must comply with the strictures of the zoning ordinance.

The ordinance allows public and private schools (Section 3.1.2.2) and allows day care centers in connection with those schools. (See detailed discussion Point II of this answer.)

2. Petitioner states, when referring to the Trial Court decision:

> The court also found that at least one center operating in a residential zone was owned by a for profit corporation, and that all of the centers appeared to be essentially commercial ventures even though located on church property.

The Trial Court stated, however, (Page D-7 of the Petition):

> Cohen lists seven day facilities that *she claims* operates religiously-affiliated buildings in areas zoned for residential use. Four of them are located in R-2 single-family districts, one is in an R-4 multiple-family district and two are in R-5 multiple-family districts. *According to Cohen* each of those facilities charges a fee for the services it provides, advertises in the local yellow pages and operates with a license from the State as a day care center. (Emphasis added.)

The statement then refers to Note 14 where the Court states:

> Although the fact that the yellow pages list the facilities as "nursery schools" is irrelevant as to how the ordinance would classify those facilities, it certainly is relevant to *Cohen's claim* that those facilities are essentially commercial ventures even though located on church property. (Emphasis added)

Thus, counsel's quote does not relate to a Trial Court finding, it relates to his client's claim.

ARGUMENT

I.
INTRODUCTION

In Rule 10 of this Court it is indicated that the primary considerations in connection with a petition for writ of certiorari are conflicts with decisions of a United States Court of Appeals, a State Court of last resort, or a decision of this Court.

None of the decisions cited or argued by Petitioner indicate any conflict with the unanimous decision of the Circuit Court of Appeals in this case. (*Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1994)).

Petitioner would have this Court overrule the decision of the Circuit Court of Appeals by arguing in the introduction that church operated day centers are really commercial ventures operated on church premises because the day care centers are advertised in the yellow pages. It is an interesting theory that a church becomes a business and loses its First Amendment protection by placing an adver-

tisement in the yellow pages or in a newspaper. This Court can take judicial notice under Rule 201 that such advertising by churches of its religious services is hardly unusual. Justice Brennan in his concurring opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987), clarifies the difference between commercial enterprises and a non-profit church operated enterprise as follows:

> In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. See generally Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835 (1980). This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. (Page 346)

Justice Brennan's comment that "the activities themselves are infused with a religious purpose" is particularly true when a church is involved with educating and caring for young people. Thus, the Circuit Court of Appeals in this case held:

> History and common sense teach that the care and education of young children fall within the mission of most, if not all, religious organizations. Sunday schools provide one obvious example of the way churches minister to pre-school youth. (*Cohen v. City of Des Plaines*, 8 F.3d 484 at page 492.)

II.

THE DES PLAINES ZONING ORDINANCE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Analysis of the Decisions Cited by Petitioner

1. ***Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).**

In *Amos* this Court unanimously determined that the exemption from the Federal Civil Rights Act allowing churches to restrict their employees to members of the church's faith was constitutional as applied to a church gymnasium. The Deseret gymnasium in the *Amos* decision was a secular operation open to the public but run by the church. This is directly analogous to the church day school permitted under the Des Plaines zoning ordinance.

Justice White in the *Amos* opinion dealt specifically with Petitioner's argument in this case that the Des Plaines ordinance confers a benefit upon church operated child care facilities that is unavailable to others:

> We find unpersuasive the District Court's reliance on the fact that §702 singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, see n. 11, *supra*, it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. See *supra*, at 2867-2868. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.

2. *Texas Monthly Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890 (1989).

In *Bullock* this Court held that a Texas tax exemption applicable to the sale of religious literature violated the Establishment Clause. *Bullock* is not relevant to the Des Plaines ordinance for the following reasons:

A. The statute in *Bullock* put the Court in the position of having to examine on a pamphlet-by-pamphlet basis what was religious and what was secular. Under the Des Plaines ordinance no such examination is necessary as the day care centers operated by the church are non-sectarian.

B. *Bullock* involved a tax subsidy to the church that automatically placed an additional tax burden on non-religious sellers of pamphlets or the purchasers thereof. No such tax burden is involved under the Des Plaines ordinance.

C. The *Bullock* statute was not authorized by this Court's decision in *Walz v. Tax Commissioner*, 397 U.S. 664, 90 S.Ct. 1409 (1970), because the tax exemption in *Walz* extended to non-religious organizations. The zoning exception under the Des Plaines ordinance applies not only to religious uses but also exempts public schools, elementary and high or private schools having a curriculum the same as ordinarily given in a public elementary or high school; colleges, junior colleges or universities. (Section 3.1.2.2 of the Des Plaines zoning ordinance. Footnote 7 in the Circuit Court of Appeals decision, 8 F.3d 494 and *supra* page 2.)

D. There is no indication in this Court's decision in *Texas Monthly, Inc. v. Bullock* of an intent to limit the unanimous decision in *Amos*. Thus, it is stated

in the concurring decision of Justices Blackmun and O'Connor:

> Although some forms of accommodating religion are constitutionally permissible (See *Corporation of Presiding Bishop v. Amos*) this one surely is not. (*Bullock*, 489 U.S. at 28.)

The Des Plaines ordinance does not grant tax relief or a subsidy to the church. It simply allows a customary ancillary use.

3. *Mueller v. Alan*, 463 U.S. 388, 103 S.Ct. 3062 (1983).

Mueller v. Alan involved a Minnesota statute which allowed state taxpayers to deduct from income taxes expenses incurred in providing "tuition, text books and transportations" for their children attending elementary or secondary schools. (Page 388) A taxpayer's suit was brought alleging that the payment of tuition was a direct benefit to parochial schools. Petitioner quotes the following from *Bullock* where *Bullock* discusses *Mueller*:

> In *Mueller* the court 'deemed it particularly significant that the deduction is available for educational expenses incurred by all parents including those whose children attend public schools and those whose children attend non-sectarian, private or sectarian private schools.' (*Bullock*, 489 U.S. at 12; *Mueller*, 463 U.S. at 397.)

It is difficult to comprehend Petitioner's reliance on this quote from *Mueller* because the Des Plaines zoning ordinance not only allows day care centers for churches, but day care centers are allowed for public and private schools as well. As the ordinance provides that property may, without any special permission from the City, be used for the following uses, among others:

> 3.1.2.2: Public schools, elementary and high or private schools having a curriculum the same as ordi-

narily given in a public elementary or high school; colleges, junior colleges or universities.

The School Code (Ill.Rev.Stat. ch. 122, paras. 10-22.18(a) and 10-23.2 (1991) now 105 ILCS 5/10-22.18 and 23.2), specifically allows public schools to operate child care and training centers and nursery schools. (See Footnote 7 of the Circuit Court of Appeals decision, 8 F.3d at page 494 and *supra* pages 1, 2.)

Day care centers are also authorized as an incidental use for private elementary schools as those schools, along with public schools, are excluded from the State of Illinois day care licensing statute, Ill.Rev.Stat. ch. 23, para. 2212.09 (1991), now 225 ILCS 10/2.09 (See *supra* page 2), and the Des Plaines ordinance exempts day care centers exempt from the State licensing provision. Ordinance sec. 1.2.17. (See *supra* page 2.)

Thus, *Mueller* supports the decision of the Circuit Court of Appeals in this case.

III.

THE SINGLE-FAMILY RESIDENTIAL CLASSIFICATION OF THE DES PLAINES ORDINANCE DOES NOT DENY PETITIONER EQUAL PROTECTION

The Des Plaines zoning ordinance prohibits business uses in its single-family zoning district. Ever since such a zoning classification was sustained by this Court in *Euclid v. Ambler Realty*, 272 U.S. 265 (1926), this has not been a revolutionary doctrine. Petitioner alleges, however, that a church operated day care center allows the same undesirable conditions as a day care center operated as a business, including the potential for excessive traffic, noise and congestion.

Petitioner overlooks, however, that communities may use as a factor in their zoning classifications the benefits

that some uses confer upon the community. The difference is pointed out in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. at 342:

> In contrast to a for-profit corporation a non-profit organization must utilize its earnings to finance the continued provisions of the goods or services it furnishes and may not distribute any surplus to the owners.

The reasonableness of this classification is supported by the Illinois Supreme Court in a decision not involving a religious use. In *City of Champaign v. Roseman*, 15 Ill.2d 363, 155 N.E.2d 34 (1958), the Illinois Supreme Court dealt with the weighing of benefits that a use may provide in holding that it was permissible to permit physicians' and surgeons' offices in a zoning district if connected with hospitals or clinics but not permissible in a separately established doctor's office. The Illinois Supreme Court stated:

> Defendants urge that a physician's and surgeon's office is no more detrimental to public health, safety or welfare than the permitted uses under the ordinance. Their particular target is the provision permitting "hospitals and clinics" used for the diagnosis and treatment of human ills, while denying them the use of their property for the same purpose. We think the difference is apparent. Hospitals, whether privately or publicly owned, are institutions operated largely for the benefit of the community by the care and treatment of bed patients. 15 Ill.2d at 366.

Without regard to the religious question, conditioning an ancillary use on the basis of the desirability of the principal use is, according to the Illinois Supreme Court, a "rational" decision.

The Circuit Court of Appeals in this case also points out:

> First, allowing churches to provide child care and educational services coheres with the religious mis-

> sions of most churches and thus implicates rights protected by the Free Exercise Clause. This country has long recognized the right of religious organizations to educate their youngest members. (Page 492)

The removal of a potential burden on the free exercise of religion is an additional reason why the classification is not a violation of equal protection.

Public schools, including day care centers, are also a permitted use in the Des Plaines single-family zoning classification. A public high school customarily brings undesirable elements to a single-family zoning district particularly in connection with athletic events and parking. Public schools often provide food services, however, allowing food service uses by a school that serves the community does not mean that a McDonalds restaurant has to be allowed in a single-family zone.

CONCLUSION

Respondent therefore requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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